[illegible]

SUPREME COURT OF THE UNITED STATES

[illegible]

No. [redacted]316

ROBINS DRY DOCK & REPAIR COMPANY, PLAINTIFF IN ERROR,

vs.

LARS DAHL

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

[illegible]

(30,180)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 870

ROBINS DRY DOCK & REPAIR COMPANY, PLAINTIFF IN ERROR,

vs.

LARS DAHL

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

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[fol. a] UNITED STATES OF AMERICA, ss:

WRIT OF ERROR

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, County of Kings, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Robins Dry Dock & Repair Company, plaintiff in error, and Lars Dahl, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their be-[fol. b] ing repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Robins Dry Dock & Repair Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-ninth day of February, in the year of our Lord one thousand nine hundred and twenty-four.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

Allowed by Louis D. Brandeis, Associate Justice of the Supreme Court of the United States.

[fols. c & d] CITATION IN USUAL FORM AND AFFIDAVIT OF SERVICE ON WM. V. BURKE—Omitted in printing

[fol. e] STATE OF NEW YORK,
County of Kings, ss:

CLERK'S CERTIFICATE

I, William E. Kelly, Clerk of the Supreme Court of the State of New York, for the County of Kings, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages number- 1 to 150, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of Robins Drydock & Repair Company, plaintiff in error, against Lars Dahl, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed, at the City of New York, Borough of Brooklyn, State of New York, this 5" day of March, in the year of our Lord, one thousand nine hundred and twenty-four.

William E. Kelly, Clerk. (Seal Kings County.)

[fol. 1] **SUPREME COURT, KINGS COUNTY**

LARS DAHL, Plaintiff,

against

ROBINS DRY DOCK & REPAIR COMPANY, Defendant

NOTICE OF APPEAL

SIRS: Please take notice that the defendant in the above entitled action hereby appeals to the Appellate Division of the Supreme Court, Second Department, from the judgment of the Supreme Court, [fol. 2] Kings County, entered in the office of the Clerk of the County of Kings, on the 1st day of May, 1923, in favor of the plaintiff and against the defendant for the sum of Fifteen thousand ($15,000) Dollars, together with Three hundred and seven 85/100 ($307.85) Dollars costs as taxed by the Clerk, amounting in all to the sum of Fifteen thousand three hundred and seven 85/100 ($15,307.85) Dollars, and also from an order entered in said Clerk's office on the 16th day of May, 1923, denying a motion to set aside the verdict and for a new trial of the said action, and from each and every part of said order.

Dated, New York, May 18th, 1923.

A. G. Maul, Attorney for Defendant, 220 Broadway, Borough of Manhattan, City of New York.

To William V. Burke, Esq., Attorney for Plaintiff; William E. Kelly, Esq., Clerk of Kings County.

[fol. 3] SUPREME COURT OF NEW YORK, KINGS COUNTY

[Title omitted]

SUMMONS

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, August 18th, 1920.

Lewis C. Boehm, Plaintiff's Attorney. Office & P. O. Address, No. 1 Broadway, New York City.

[fol. 4] SUPREME COURT OF NEW YORK, KINGS COUNTY

[Title omitted]

COMPLAINT

The plaintiff herein by Lewis C. Boehm, his attorney, complaining of the defendant, alleges and sets forth as follows:

First. On information and belief, that at all the times hereinafter mentioned, the defendant was a domestic corporation, organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at Number 15 Whitehall Street, in the Borough of Manhattan, City of New York.

Second. That on or about the 2nd day of February, 1920, the defendant herein was doing work on the S. S. "El Occident" which was at the dry dock of the defendant, undergoing repairs, and that the plaintiff herein was employed by the defendant as a shipyard worker, and was working for the defendant on the S. S. "El Occident."

[fol. 5] Third. That on or about the 2nd day of February, 1920, while employed on the S. S. "El Occident," working for the defendant herein, the plaintiff as a result of the negligence of the defendant, its agents, servants and employees, and its failure to provide a safe place to work in, properly equipped, maintained and inspected, and without any negligence on the part of the plaintiff contributing thereto, was violently thrown and precipitated from the platform in the engine room of the S. S. "El Occident" to the floor of the engine room, and as a result of said fall and said neg-

ligence, sustained an injury on account thereof, the plaintiff suffered severe mental shock and bodily anguish, and was injured at the base of his spinal column, and injured internally, as a result of which plaintiff has been forced to expend large sums of money for his maintenance, medicines, and doctor's bills, and has been wholly hindered and prevented from engaging in his usual occupation or any other occupation whereby he might earn a living all to his damages in the sum of $30,000.

Wherefore, the plaintiff demands judgment against the defendant in the sum of $30,000 together with interest from the 2nd day of February, 1920, and the costs of this action.

Lewis C. Boehm, Attorney for Plaintiff, Office & P. O. Address, 1 Broadway, Borough of Manhattan, City of New York.

[fol. 6] Jurat showing the foregoing was duly sworn to by Lars Dahl omitted in printing.

[fol. 7] SUPREME COURT, KINGS COUNTY

[Title omitted]

ANSWER

The defendant, by its attorney, A. G. Maul, answering the complaint of the plaintiff herein, respectfully says upon information and belief:

I. It denies each and every allegation contained in paragraph "Third" of plaintiff's complaint.

For a first, separate and distinct defense defendant alleges upon information and belief:

II. That any injuries sustained or suffered by the plaintiff at the time and place or on the occasion mentioned in the complaint were caused in whole or in part or were contributed to by the negligence and want of care of the plaintiff and not by any negligence or fault or want of care on the part of this defendant.

For a second, separate and distinct defense, defendant alleges upon information and belief:

III. That if any negligence or fault or want of care other than [fol. 8] that of the plaintiff himself caused or contributed to cause the injuries alleged in the complaint, it was the negligence or fault or want of care of a competent fellow servant or fellow servants of plaintiff in the employment of the defendant and said injuries were not caused by any negligence or want of care on the part of the defendant.

For a third, separate and distinct defense, defendant alleges upon information and belief:

IV. That plaintiff had full knowledge of the methods used by defendant in its work and knew the dangers thereof; that the injury alleged in the complaint was caused by an obvious risk of the defendant's business and such risk was assumed by the plaintiff.

Wherefore, defendant demands judgment dismissing the complaint with costs.

A. G. Maul, Attorney for Defendant. Office & P. O. Address, 256 Broadway, Borough of Manhattan, City of New York.

Jurat showing the foregoing was duly sworn to by Carl R. Riedel omitted in printing.

[fol. 9] SUPREME COURT, KINGS COUNTY

[Title omitted]

AMENDED COMPLAINT

For his amended complaint herein the plaintiff by William V. Burke, his attorney, complaining of the defendant, alleges and sets forth as follows:

[fol. 10] First. On information and belief, that at all the times hereinafter mentioned, the defendant was a domestic corporation, organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at Number 15 Whitehall Street, in the Borough of Manhattan, City of New York.

Second. That on or about the 2nd day of February, 1920, the defendant herein was doing work on the SS. "El Occident" which was at the dry dock of the defendant, undergoing repairs, and that the plaintiff was employed by the defendant as a ship yard worker, and was working for the defendant on the S. S. "El Occident."

Third. That on or about the 2nd day of February, 1920, while plaintiff was in the employ of the defendant and working on the said steamship "El Occident" a plank on which plaintiff was walking and standing while in the performance of his work as a servant of the defendant broke and caused plaintiff to fall into the hold of said vessel.

Fourth. There by reason of the premises plaintiff sustained severe and permanent injuries to his head, body and limbs as well as internal injuries in consequence of which he has suffered and will in the future suffer much pain, distress and disability, has been and believes he will in the future be put to expense for medical and surgical treatment and medicines, has been and believes he will in the future be prevented from properly performing his usual work and earning a livelihood, has suffered and believes he will in the future

suffer loss of earnings all to his damage in the sum of Fifty Thousand Dollars.

[fol.11] Fifth. That the aforesaid injuries to plaintiff were caused solely by and through the negligence of the defendant in that the defendant negligently and carelessly failed to furnish plaintiff with a safe place to work and safe ways and works on or in which to work, and negligently and carelessly furnished plaintiff and its other workmen an unsafe, inadequate and unsuitable plank on which to work, which plank was not of sufficient thickness or strength for the purpose for which it was provided by defendant and was made of wood having a short grain and which contained a knot or knots which diminished its strength, and defendant failed to inspect or test said plank and failed to warn plaintiff of the unsafe plank and unsafe place to work.

Wherefore plaintiff demands judgment against the defendant herein for the sum of Fifty Thousand Dollars damages together with the costs and disbursements of this action.

William V. Burke, Attorney for Plaintiff, Office & P. O. Address, 375 Fulton Street, Borough of Brooklyn, City of New York.

[fol. 12] Jurat showing the foregoing was duly sworn to by Lars Dahl omitted in printing.

SUPREME COURT, KINGS COUNTY

[Title omitted]

ANSWER TO AMENDED COMPLAINT

The defendant, by A. G. Maul, its attorney, answering the com-[fol. 13] plaint of the plaintiff herein, respectfully shows to this Court, upon information and belief:

I. Defendant admits that on or about the 2nd day of February, 1920, plaintiff was in its employ but, except as so specifically admitted, denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph "Second" of the complaint.

II. Defendant denies each and every allegation contained in paragraphs "Third," "Fourth" and "Fifth" of the complaint.

For a first, separate and distinct defense, defendant alleges upon information and belief:

I. That any injuries sustained or suffered by the plaintiff at the time and place or on the occasion mentioned in the complaint were caused in whole or in part or were contributed to by the negligence

and want of care of the plaintiff and not by any negligence or fault or want of care on the part of this defendant.

For a second, separate and distinct defense, defendant alleges upon information and belief:

I. That if any negligence or fault or want of care other than that of the plaintiff himself caused or contributed to cause the injuries alleged in the complaint, it was the negligence or fault or want of care of a competent fellow servant or fellow servants of plaintiff in [fols. 14 & 15] the employment of the defendant and said injuries were not caused by any negligence or want of care on the part of the defendant.

For a third, separate and distinct defense, defendant alleges upon information and belief:

I. That plaintiff had full knowledge of the methods used by defendant in its work and knew the dangers thereof; that the injury alleged in the complaint was caused by an obvious risk of the defendant's business and such risk was assumed by the plaintiff.

Wherefore defendant demands judgment dismissing the complaint with costs.

A. G. Maul, Attorney for Defendant. Office & P. O. Address, 220 Broadway, Borough of Manhattan, City of New York.

Jurat showing the foregoing was duly sworn to by Wm. F. Galliers omitted in printing.

[fol. 16] SUPREME COURT, KINGS COUNTY

[Title omitted]

NOTICE OF TRIAL

Please take notice, that the issues of law and fact in this action will be brought to trial, and an Inquest taken therein, at a Trial Term appointed to be held in and for the County of Kings, at the County Court House in Borough of Brooklyn, on the 6th day of December, 1920, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated the 13th day of November, 1920.

Yours, etc., Lewis C. Boehm, Attorney for Plaintiff, 121 Broad St,. New York, N. Y.

To A. G. Maul, Esq., Attorney for Defendant, 256 Broadway, New York, N. Y.

[fol. 17] SUPREME COURT, KINGS COUNTY

[Title omitted]

DEFENDANT'S NOTICE OF TRIAL

SIR: Please to take notice, that the issues of law and fact in this action will be brought to trial, and a motion made to dismiss the complaint therein at a Trial Term of this Court, appointed to be held in and for the County of Kings at the County Court House in the Borough of Brooklyn, on the 6th day of December, 1920, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated the 19th day of November, 1920.

Yours, etc., A. G. Maul, Attorney for Defendant, 256 Broadway, Borough of Manhattan, City of New York.

To Lewis C. Boehm, Attorney for Plaintiff, 121 Broad Street, New York, N. Y.

[fol. 18] SUPREME COURT, KINGS COUNTY

[Title omitted]

BILL OF PARTICULARS

The following is plaintiff's bill of particulars herein:

First. The accident happened on the 2nd day of February, 1920, about 7:30 A.M.

Second. Plaintiff's accident happened on the 2nd gallery of the engine room which was even with the upper between deck. The happening of the accident took place on the starboard side of the engine room.

Third. The accident happened in manner following: Plaintiff and other men were engaged in moving one of the valves belonging to the engine on said ship. At the point where the valve was located at the time of the accident there was an open space in the floor of the gallery above mentioned which was covered with planks and plaintiff stepped on one of the planks which broke and caused plaintiff to fall into the hold of the vessel.

[fol. 19] Fourth, Fifth and Sixth. The negligence complained of is as follows:—The defendant negligently furnished plaintiff and the other workmen with an unsafe plank to bridge over the open space in the gallery aforesaid and the said plank was unsafe because it was not of sufficient strength and thickness to support the weight of plaintiff and other workmen who were directed to work in and about the place of accident. The plank was further unsafe because

of the short grain of the wood composing it and the existence of knots in the wood which greatly lessened its strength. The said plank was also unsafe because not of the type or character of wood usually and customarily used for the purpose for which the plank in question was provided by defendant.

Defendant negligently directed the use of said unsafe, unsuitable and defective plank for the purpose which it was being used at the time of plaintiff's accident. The defendant was further negligent in that it failed to inspect, or test said plank and see that same was of adequate and sufficient strength for the purpose for which it was directed to be used.

Defendant negligently and carelessly directed plaintiff to use said plank of unsuitable strength.

Defendant negligently and carelessly failed to provide a plank of sufficient strength and suitable in character to bridge over said open space in the aforesaid gallery where plaintiff was directed to work at the time and place of his accident.

Defendant negligently and carelessly failed to provide plaintiff with a safe place to work and provided him with an unsafe place to work by reason of its failure to furnish planks of adequate and [fol. 20] sufficient strength and suitable in character to bridge over said open space and made the place where plaintiff was directed to work unsafe by furnishing said plank of unsuitable type and character and of insufficient strength.

Seventh. Plaintiff sustained a fracture of the fourth lumbar vertebra. At the present time a fragment of bone extends from the left border of the said vertebra upward and outward. Since the time of the accident down to the present time plaintiff has suffered great pain and weakness in the region of this fracture and this pain and weakness he believes to be permanent.

Plaintiff sustained laceration of the front of top of head, which had to be sutured. This wound was painful for about six weeks. The seat of said scalp wound is still tender under pressure and plaintiff believes the condition to be permanent.

Plaintiff sustained an inguinal hernia on the right side which is painful and permanent.

The ligaments and muscles of plaintiff's lower back were strained and plaintiff suffers pain and permanent weakness as a result thereof.

Plaintiff sustained a sprain and contusion of left ebow. The elbow was discolored, painful and swollen. The elbow was continually painful for about six weeks and since the time of the accident down to the present time plaintiff suffers intermittent pain in said elbow.

Plaintiff sustained a contusion and sprain of left foot just in front of ankle. It took about six weeks for this condition to clear up.

At the time of the accident plaintiff weighed 140 pounds. He lost 25 pounds in weight after the accident and at the present time he weighs 125 pounds.

[fol. 21] He sustained a lacerated and contused wound on left side just outside of rectum. It took about six weeks for this to heal up. There is a surface or scar tissue remaining and this is perma-

nent. For about six months after the accident plaintiff suffered considerable pain from this injury and since that time he has suffered intermittent pain. This condition he believes to be permanent.

Plaintiff has suffered from headaches, nervousness, dizziness, weakness and general debility since the time of the accident down to the present time and this condition he believes to be permanent.

Since the time of the accident down to the present time he has been totally disabled from performing his work and earning a livelihood and this condition he believes to be permanent.

Plaintiff was confined to bed for about four weeks with the exception of part of one day.

Plaintiff was confined to his home for about four months after the accident except during this period he called on his doctor and on a few occasions to the State Industrial Commission.

Ninth. Plaintiff's doctor bill amounted to $130 and $10 for X-ray. He has spent about $115 for medicines.

At the time of his injury plaintiff was earning on an average of $35 per week. The other items making up the damage in the complaint are for the plaintiff's bodily injury, pain and suffering.

Tenth. Plaintiff has not worked since the day of his accident as set forth in the complaint.

[fol. 22] Jurat showing the foregoing was duly sworn to by Lars Dahl omitted in printing.

[fol. 23] SUPREME COURT, KINGS COUNTY

[Title omitted]

EXTRACT FROM MINUTES

This cause having been called for trial in its order on the Calendar, and twelve trial jurors having been duly drawn, empanelled and sworn to try the same, the jury come into Court and say that they find a verdict for the plaintiff for Fifteen thousand ($15,000.00) Dollars. Counsel for the defendant moves to set aside the verdict and for a new trial upon all the grounds stated in section 549 of the Civil Practice Act, and that the damages are excessive.

Motion denied.

Thirty days' stay of execution after service of notice of entry of judgment and sixty days in which to make and serve a case on appeal granted to the defendant.

A true extract from the minutes.

William E. Kelly, Clerk.

[fol. 24] SUPREME COURT, KINGS COUNTY

[Tile omitted]

JUDGMENT

The issues in the above entitled action having been duly tried at a Trial Term, Part V of the Supreme Court of the State of New York, held in and for the County of Kings, at the County Court House in the Borough of Brooklyn, City of New York, on the 27th day of April, 1923, before Hon. Mitchell May, Justice and a jury, and the jury having rendered a verdict in favor of the plaintiff and against the defendant for the sum of Fifteen thousand ($15,000) Dollars and the plaintiff's costs having been duly taxed at the sum of Three hundred and seven 85/100 ($307.85) Dollars, now, on motion of William V. Burke, attorney for the plaintiff herein, it is

Adjudged, that the above named plaintiff, Lars Dahl do recover of the defendant Robins Dry Dock & Repair Company, the said sum of Fifteen thousand ($15,000) Dollars damages, together with the sum of Three hundred and seven 85/100 ($307.85) Dollars, costs as [fol. 25] taxed, amounting in the aggregate to the sum of Fifteen thousand three hundred and seven 85/100 ($15,307.85) Dollars, and that the plaintiff have execution therefor.

Judgment signed and entered this 1st day of May, 1923.

William E. Kelly, Clerk.

Served May 1st, 1923.

SUPREME COURT, KINGS COUNTY

ORDER DENYING MOTION FOR NEW TRIAL

[Title omitted]

The issues in this action having come on for trial, and having been tried on the 26th and 27th days of April, 1923, before the Court and [fol. 26] a jury, and the jury having rendered its verdict in favor of the plaintiff, and against the defendant for the sum of Fifteen thousand and 00/100 ($15,000) Dollars; and the Justice presiding at the trial aforesaid having at the same time and immediately upon the rendition of said verdict entertained a motion on his minutes on behalf of the defendant to set aside said verdict and have a new trial upon the exceptions taken by the defendant at the trial and upon all the grounds specified in Section 549 of the Civil Practice Act and that the damages are excessive, and after hearing Thomas F. Brennan, of counsel for the defendant in support of the said motion and William V. Burke, attorney for the plaintiff in opposition thereto, now

On motion of A. G. Maul, attorney for the defendant, it is

Ordered, that the said motion be and the same hereby is denied.

Enter.

Mitchell May, J. S. C.

[fol. 27] SUPREME COURT, KINGS COUNTY

[Title omitted]

CONSENT AND ORDER OF SUBSTITUTION

On reading and filing the annexed consent duly acknowledged on the 3rd day of January, 1922, and on motion of William V. Burke, it is

Ordered that said William V. Burke, of No. 375 Fulton Street, Borough of Brooklyn, City of New York, be substituted in the place and stead of Lewis C. Boehm, deceased, as attorney for the plaintiff, and it is

Further ordered that the lien accruing to the estate of said Louis C. Boehm be fixed at 12½% of any verdict of the above entitled action.

Enter.

J. Aspinall, Justice of the Supreme Court.

Granted Jan. 4, 1922. William E. Kelly.

[fol. 28] We hereby consent to the entry of the foregoing order.
Corington & Mosel, Attorneys for Charlotte C. Boehm, Admx. of Lewis C. Boehm, Dec.

[Title omitted]

It is hereby consented that William V. Burke, Esq., of No. 375 Fulton Street, in the Borough of Brooklyn, City of New York, be substituted in the place and stead of Lewis C. Boehm, Esq., deceased, as attorney for the plaintiff herein, and that the lien which may accrue to the plaintiff estate of said Lewis C. Boehm shall be fixed at 12½ per cent of any verdict or settlement therein.

Dated, January 3rd, 1922.

Lars Dahl, Plaintiff. Corington & Mosel, Attorneys for Charlotte C. Boehm, Admx. of Lewis C. Boehm, Dec.

[fol. 29] Jurat showing the foregoing was duly sworn to by Lars Dahl omitted in printing.

SUPREME COURT, KINGS COUNTY

[Title omitted]

CONSENT AND ORDER OF SUBSTITUTION

Upon the annexed consent and upon motion of A. G. Maul, attorney for the defendant, it is

[fol. 30] Ordered, that Paul Koch be, and he hereby is substituted as attorney for the defendant in this action in place of A. G. Maul.

Enter.

F. S. G., Jr., J. S. C.

[Title omitted]

We hereby consent that Paul Koch of 141 Broadway, New York City, be substituted in the place and stead of undersigned A. G. Maul, as attorney for the defendant, in the above entitled action, and that an order to that effect may be entered without further notice.

Dated, October 30, 1922.

A. G. Maul, William F. Galliers.

[fol. 31] Jurat showing the foregoing was duly sworn to by Wm. F. Galliers omitted in printing.

[fol. 32] SUPREME COURT, KINGS COUNTY

[Title omitted]

CONSENT AND ORDER OF SUBSTITUTION

Upon the annexed consent and upon motion of Paul Koch, attorney for the defendant, it is

Ordered, that A. G. Maul be, and he hereby is substituted as attorney for the defendant in this action in place of Paul Koch.

Enter.

W. F. H., J. S. C.

[fol. 33] [Title omitted]

We hereby consent that A. G. Maul of 220 Broadway, New York City, be substituted in the place and stead of the undersigned, Paul Koch, as attorney for the defendant, Robins Dry Dock, in the above entitled action, and that an order to that effect may be entered without further notice.

Dated February —, 1923.

Paul Koch, William F. Galliers.

[fol. 34] Jurat showing the foregoing was duly sworn to by Wm. F. Galliers omitted in printing.

SUPREME COURT, KINGS COUNTY, TRIAL TERM, PART V

[Title omitted]

Before Hon. Mitchell May and a Jury

Brooklyn, N. Y., April 26th and 27th, 1923.

Appearances: William V. Burke, Esq., attorney for plaintiff; A. G. Maul, Esq., (Thomas J. Brennan, Esq., of counsel), attorney for defendant.

Mr. Burke opens to jury for plaintiff.

Mr. Brennan opens to jury for defendant.

[fol. 35] MOTION AND ORDER AMENDING COMPLAINT

Mr. Burke: I move to amend Paragraph 3 of the complaint herein to read as follows:

Third: "That on or about the 2nd day of February, 1920, while plaintiff was in the employ of the defendant working on the said steamship El Occident, a plank scaffold on which plaintiff was walking and standing while in the performance of his work as a servant of the defendant broke and caused plaintiff to fall into the hold of said vessel."

Fifth. "That the aforesaid injuries to the plaintiff were caused solely by and through the negligence of the defendant in that the defendant negligently and carelessly failed to furnish plaintiff with a safe scaffold, and a safe place to work, and safe ways and works on or in which to work, and negligently and carelessly furnished plaintiff and its other workmen an unsafe, inadequate and unsuitable scaffold and plank on which to work, which scaffold and plank were not sufficient thickness or strength for the purpose for which they were provided by defendant, and were made of wood having a short grain, and which contained a knot or knots which diminished the strength of said scaffold and plank, and defendant failed to inspect or test said scaffold and plank and scaffold, and unsafe place to work, and failed to furnish plaintiff with a safe scaffold as required by the Labor Law of the State of New York."

Mr. Brennan: I object to the amendment on the ground that it is plainly an amendment intended to conform with the opinion of [fol. 36] the Appellate Division in this case. And I object on the further ground that it is an attempt to apply Section 18 of the Labor Law of the State of New York to this issue, and the application of Section 18 of the Labor Law is unconstitutional in that it modifies and changes the fundamental admiralty law by imposing additional duties on the defendant, depriving it of its defenses and changes the rights and duties of the parties, thus destroying the uniformity of the admiralty law as contemplated in Article 3, Sec-

tions 24 and 256 of the United States Judicial Code; in short, that it is unconstitutional.

The Court: I will allow the amendment on the ground that it is made to conform with the opinion of the Appellate Division. So long as the decision in the Wilkes case remains the law I am bound by it no matter whether it conforms to my ideas of the law or not. It is unfortunate that that case has not yet been finally determined, and this case is merely following in the foots-eps of the Wilkes case.

By Mr. Brennan: Exception.

LARS DAHL, being duly sworn, testified, as follows:

Direct examination by Mr. Burke:

Q. Where do you live?
A. 68 Third Street, Brooklyn.
Q. Mr. Dahl, you are the plaintiff in this action?
A. Yes, sir.
Q. Where did you live on the 2nd day of February, 1920?
A. 68 Coles Street.
[fol. 37] Q. You reside at 68 Coles Street now?
A. Yes.
Q. On the 2nd day of February, 1920, were you working for the defendant Robins Dry Dock & Repair Co.?
A. Yes, sir.
Q. Had you been working in their shipyard for some little time before the accident that we are going to talk about here?
A. Yes, sir.
Q. How long had you been working for them?
A. About a year.
Q. On this morning of February 2nd, when this accident happened, were you working on one of the ships that they were doing repair work on?
A. Yes, sir.
Q. What was the name of the ship that you were working on?
A. El Occident.
Q. What kind of work was it that was being done on that ship that morning?
A. Moving a valve.
Q. Where was the valve that morning before you moved it?
A. In the between deck.
Q. Was there more than one between deck on that ship?
A. Yes.
Q. Which one of the between decks do you say this was that you had the valve on?
A. On the upper between deck.
Q. Was there a partition which ran around the engine room of that ship and divided off the various decks from the engine room?
A. Yes, sir.
Q. Inside of that partition, and running around the engine room was there a grating or gallery?

A. Yes, sir.

Q. Take the between deck that you were on, and that this valve was on, the upper between deck, was there a doorway or passageway from that deck into the engine room?

A. Yes.

[fol. 38] Q. When you went through that passageway would you go into this grating or gallery?

A. Yes, sir.

Q. In other words was the grating that ran around the engine room about on a level with the floor of that between deck?

A. Yes, sir.

Q. This grating that ran around there, could that be taken up in sections when they wanted to take it up?

A. Yes.

Q. On the morning of this accident had a certain part of or section of that grating been removed?

A. Yes.

Q. About how much in length, how long a part of the grating had been removed?

A. About ten feet.

Q. About how wide was this grating?

A. About two foot six.

Q. About two foot and a half wide?

A. Yes, sir.

Q. Then when the grating was removed how wide would you say the entire space was?

A. About three feet.

Q. What time did you go to work that morning?

A. At seven o'clock in the morning.

Q. When you started to work there what other men were working with you in the same gang?

A. Six men and the foreman.

Q. What was the foreman's name?

A. Kilbride.

Q. What did they call you?

A. Machinist's helper.

Q. What work did you actually do around on the ship there?

A. Help the machinists, help the riggers.

[fol. 39] Q. That required you to carry tools and hand up supplies and such things as they needed?

A. Yes.

Q. When you started to work there that morning were there any kind of boards spacing over this open space about ten feet long and three feet wide?

A. Yes, sir.

Q. What kind of boards were there in the early part of the morning?

A. There were some one inch board running across there.

Q. Did Kilbride the foreman give any directions about taking those boards away and bringing planks, or about spacing over that open space?

A. Yes, sir, I seen him taking up one inch boards.
Q. What did the foreman say about removing these one inch boards that were spacing over this space?
A. He took it up and said it was no good, the one inch board he took it up, he said it was no good.
Q. Did you take them away?
A. Yes.
Q. Did he give you any directions about getting any other planks for bridging over that space?
A. Yes, sir, he told us to go and look for a plank.
Q. What was it that the foreman Kilbride said to you about getting planks, you and the other men?
A. He told us to go for a plank.
Q. Where did you go to look for the planks?
A. Went on the forward part of the ship.
Q. You went to the forepart of the ship, you say?
A. Yes.
Q. How many men went?
A. Six men.
Q. Did you search around there for planks?
A. Yes, sir.
Q. Did any of the men bring back any planks to the foreman?
A. Yes, sir.
[fol. 40] Q. How many planks would you say were brought back to him?
A. Two.
Q. Did Kilbride, the foreman, look at those two planks?
A. Yes.
Q. Did he accept them or reject them?
A. He rejected them.
Q. What did he say to you men after having rejected those two planks, what did he say about getting any other planks?
A. He said, "Look around, you will find some kind of plank."
Q. Did you men go off then to some other part of the ship?
A. Yes, sir.
Q. What part of the ship did you go to at that time?
A. The aft part of the ship.
Q. Did you search for planks there?
A. Yes, sir.
Q. Did you find any planks?
A. Yes, sir.
Q. How many did you find altogether?
A. One.
Q. Will you tell us what was the size of that plank, in your best judgment, as to its length, width and thickness?
A. It was about fourteen feet long, fourteen to sixteen feet long, about two inches thick, and about six inches wide.
Q. Were you one of the men that found that plank?
A. Yes, sir.
Q. Who else with you when you found that plank?
A. Pat Kenny.

Q. Did you two men bring that plank over to the foreman Kilbride?
A. Yes.
Q. What did you say to Kilbride and what did he say to you.
A. We asked him if that plank was all right.
Q. What did he say?
A. He said, "Yes."
Q. Did he look at the plank?
A. Yes, sir.
[fol. 41] Q. And then what did he direct you to do with the plank?
A. To lay it in on the opening.
Q. To lay it across this open space?
A. Yes.
Q. And was it laid down there across the open space?
A. Yes.
Q. Did Kilbride himself have one end of the plank when it was placed in position?
A. Yes, sir.
Q. What did you do right after that plank had been laid across that space?
A. Then we hoisted the valve into the machinery.
Q. The value at that time, as I think you said before, was out on the deck?
A. Yes, sir.
Q. Did you go out to the deck to help lift or have the valve raised into the engine room?
A. Yes.
Q. And after having done that did you go back onto to this grating again?
A. After the valve was hanging inside of the machine room.
Q. Where would you say it was hanging in the engine room?
A. It was hanging right over the plank that broke.
Q. Did you after coming off the deck go over to the place where this valve was hanging?
A. Yes.
Q. Who was there besides you?
A. Kilbride.
Q. Were you the only two just at that point?
A. Yes.
Q. What were you doing?
A. We were working on that valve.
Q. Just what was it that you were trying to do with the valve when the accident happened?
A. Put a sling on it.
Q. When you were doing that work what happened?
A. The plank broke and I went down, I don't know what happened after that.
[fol. 42] Q. You went down, did you?
A. Yes.
Q. The plank broke?
A. Yes.

Q. The plank that you found together with Kenny and brought over for the inspection of Kilbride, the foreman, was that about the size and the length of the plank that you had usually seen around that work used for bridging over, etc.?

A. Yes, sir.

Q. What was the next thing that you remember after having fallen?

A. I found myself sitting in the Emergency Hospital in the yard with a nurse stitching my scalp.

Q. The Robins Dry Dock maintain an emergency hospital down in the shipyard, don't they?

A. Yes, sir.

Q. And that is where you found yourself later on after the accident?

A. Yes.

Q. Were you suffering any pain when you recognized your surroundings?

A. Yes, sir, everything pained all over.

Q. Did any doctor or ambulance surgeon attend you while you were in the emergency hospital?

A. No, sir.

Q. Not one?

A. No, sir.

Q. Did an ambulance come from some hospital?

A. Yes, sir.

Q. What hospital were you taken to?

A. Holy Family.

Q. When they got you into the Holy Family hospital were you placed in bed?

A. Yes, sir.

Q. For how long were you in that hospital?

A. For one week.

Q. During the week that you were in the Holy Family Hospital [fol. 43] just tell us how you felt, where you suffered pain, if you did, briefly what your condition was?

A. My body suffered pain all over, completely broke up I was at the time.

Q. You were suffering pain all over, you didn't feel one part of your body hurt any more than the other, is that right?

A. I couldn't tell you definitely which part was hurt that day.

Q. Then you went from the hospital to your home, is that right?

A. Yes, sir.

Q. Did you have your family physician come in to treat you at your home?

A. Not right away.

Q. This accident happened on the 2nd of February. Do you know what day in February it was that you went from the hospital to your home?

A. On the 7th.

Q. You think it was the 7th?

A. The 7th or 8th, yes, sir.

Q. Anyway you called in what doctor?
A. Dr. Sheehan.
Q. Where is his office?
A. Clinton Street.
Q. For how long a time were you in bed at home?
A. Four weeks.
Q. Did you a short time after you got home, go out of the house?
A. Yes, sir.
Q. Do you know how long it was after the accident that you went out of the house?
A. I went about the middle of February.
Q. Where did you go on that occasion?
A. Then I went to Robins Dry Dock yard.
Q. How far is the Robins Dry Dock from 68 Coles Street, where you lived?
A. Ten minutes walk.
Q. How long on this occasion when you walked down there did it take you to walk from your home to the Robins Dry Dock?
A. Two hours.
[fol. 44] Q. How did you feel on your way down, were you suffering pain anywhere?
A. I was suffering pain, I used a stick I wanted to go down to find out how this accident happened.
Q. I asked you were you suffering pain as you went from your home down to the Robins yard?
A. Yes, sir.
Q. Did you also walk back home from the Robins yard?
A. I did.
Q. Just tell us how long it took you to get home and how you felt?
A. I can't tell how long it took me to get home, I took over two hours on my way home, I got as far as Coffey Park——

Mr. Brennan: I don't understand the purpose of this examination.
The Court: To show the amount of suffering.
Mr. Brennan: I think this is just an attempt to work on the jury.
The Court: Allowed.
Mr. Brennan: Exception.

Q. You were telling how you got home?
A. When I came to Coffey Park I had to stop, I was so sick with pain I couldn't get no farther.
Q. Did somebody from that point assist you to your home?
A. Yes, sir.
Q. For how long were you confined to your house, apart from this little excursion down on to the dry dock, how long were you confined to your house after this accident?
A. Two weeks.
Q. Then did you go out after that?
A. Yes sir.
Q. Where did you go?
A. I went to a doctor.

[fol. 45] Q. Did you go anywhere else but to your Doctor on these occasions when you went out of the house?

A. No, that is about all.

Q. You went out to the doctor. Is that the only place you went?

A. Yes.

Q. When you first got out of the house did you use a cane or crutch or anything to help you walk?

A. Yes, sir.

Q. What did you use?

A. A cane.

Q. For how long a time did you use that cane?

A. I use a cane yet.

Q. For how long a time were you under the care of Dr. Sheehan?

A. I was under the care of Dr. Sheehan for two years, over two years, and I go to Dr. Sheehan yet occasionally.

Q. After you had been home for sometime will you tell us just where you suffered the most pain, in what part of your body?

A. My back was the worst part of my body suffering.

Q. Apart from the pain in the back did you suffer pain anywhere else about your body?

A. The whole left side from head to foot.

Q. You were suffering the whole left side from head to foot?

A. Yes, sir.

Q. For how long did you continue to suffer pain throughout the whole left side?

A. I suffer yet.

Q. The pain in your back, has that gone away, or does that still continue?

A. No, sir.

Q. You still have it?

A. I have it now at the present minute.

Q. What was the condition of your left elbow after this injury?

A. My left elbow is weak, I can hardly lift anything with my left arm.

Q. Was the left elbow bruised or discolored or swollen?

A. Yes.

[fol. 46] Q. What was the condition; just tell us what you saw and felt?

A. It was swollen, black and blue, and after the swelling went down this bone has grown out to a point.

Q. What was the condition of your left foot after this injury?

A. It was bruised and swollen.

Q. For how long did that condition hurt you?

A. It hurts me yet, it swells up if I walk much.

Q. Did you sustain any cuts on the head?

A. Yes, sir.

Q. What part of the head? (Indicating) Right about here.

—. —.

Q. Across the top of the head, you are indicating?

A. Yes, sir.

Q. What other injury besides those that I have mentioned did you sustain as a result of this accident?

A. I had an injury to the seat.
Q. An injury to the rectum?
A. Yes, sir.

Mr. Brennan: He didn't say that.

Q. Did you mean the rectum when you said seat?

Mr. Brennan: Objected to.
The Court: Show the jury where you had pain?
The Witness: Near my rectum.

Q. Near it?
A. A big wound near my rectum.
Q. What other injury did you sustain?
A. I sustained a rupture.
Q. Has that rupture continued down to the present time?
A. Yes, sir.
Q. How long did it take this wound which you had near the rectum to heal up?
[fol. 47] A. I don't recollect how long it took, it pains at the present time at times.
Q. Since the time that you met with this injury have you tried to lift any weights at all, Mr. Dahl?
A. Yes, sir.
Q. And what have you tried to lift?
A. I tried to lift the mattress about a week ago.
Q. When you tried to lift the mattress and turn it over how did your back feel?
A. I couldn't do it, there wasn't strength enough in my back to lift it.
Q. Did you try to lift anything else besides turning over the mattress?
A. I tried to help my wife with the wash boiler the other day.
Q. You tried to lift what?
A. The wash boiler for my wife.
Q. How did your back feel when you tried to lift that?
A. I had to give it up, I couldn't do it.
Q. Do you feel pain in the back when you try to lift anything?
A. Yes.
Q. Do you feel pain in the back when you stoop over?
A. Yes, sir.
Q. At the time of the accident how much did you weigh?
A. 140 lbs.
Q. And afterwards did you lose weight?
A. Yes, sir.
Q. How much weight did you lose?
A. I fell off to 115 lbs.
Q. Tell us how you have felt in the head since the time of this injury right down to the present time?
A. I have occasionally heavy headaches that last for two or three days in the region of where I hurt myself.
Q. Do you have any dizziness of the head?

A. Yes, sir, I am troubled with dizziness.
Q. How old are you?
A. Fifty-one years old.
[fol. 48] Q. Had you worked steadily right along before this second day of February, 1920, when you met with this injury?
A. Yes, sir.
Q. What other kind of work had you done besides working around shipyards?
A. I have done painting, gone to sea.
Q. Painting, and you have been out to sea on ships?
A. Yes, sir.
Q. For how many years had you been a painter?
A. About four years.
Q. Had you any trouble of any kind with your back before the day of this accident that we are talking about here?
A. No, sir.
Q. Did you have any dizziness or pain in your head before that time?
A. No, sir.
Q. Did you have any, as far as you knew, any hernia before that day?
A. No.
Q. Was there anything the matter with your left elbow, or your left foot, or any part of your left side, before the day of this accident, that you knew of?
A. No, sir.
Q. How much were you earning a week at the time of the accident?
A. I averaged $35 a week.
Q. There is a statement in the bill of particulars, Mr. Dahl, which says——

Mr. Brennan: Objected to.
The Court: Objection sustained.

Q. I will ask you again, how long do you say you were confined to your house with the exception of going out to your doctor?
A. About four months.
[fol. 49] Q. Have you ever done any work since the day of this accident, Mr. Dahl, down to the present time?
A. No, sir.
Q. Where do you spend most of your time?
A. In my house.
Q. Do you do any part of the house work?
A. Yes, sir, I look after the children, I do a little bit when my wife is out.

Cross-examination by Mr. Brennan:

Q. When is the last time you weighed yourself, Mr. Dahl?
A. About one week ago.
Q. How much did you weigh then?

A. 126 lbs.

Q. You say that your original weight when you were working in the Robins Dry Dock & Repair Co. was about 150?

A. 140.

Q. Of course, while working down there you were constantly climbing around ships up and down ladders, etc., weren't you?

A. Yes.

Q. How long had you been a sailor?

A. About twelve years.

Q. On sailing vessels or on steamships?

A. On sailing vessels.

Q. And after leaving the sea did you start to work as a painter?

A. Yes, sir.

Q. And as a painter did you frequently use scaffolding to stand on, planking, etc.?

A. No.

Q. Never?

A. Not for painting.

Q. You never used a plank to stand on in all the four years you were a painter?

A. No, I never worked at that kind of painting.

Q. What kind of painting were you doing?

A. I was painting fences at the time I was painting.

Q. Painting fences for four years?

A. Nearly that, about that.

[fol. 50] Q. In all of those four years you never had to stand on a plank or any other scaffold while you were painting fences?

A. No, sir.

Q. When did these headaches start, Mr. Dahl.

A. They started at the time I was in the hospital.

Q. And the dizziness, the same time?

A. Yes, sir.

Q. And they have continued ever since, have they?

A. Yes, sir.

Q. This case was tried once before here in this court, wasn't it, about a year ago?

A. Yes, sir.

Q. Just a year ago?

A. Yes, sir, about that.

Q. Did you say anything then about headaches and dizziness?

A. Yes, sir.

Q. At the trial?

A. I think so.

Q. Are you sure about it?

A. If it was asked me I did.

Q. Are you sure you spoke about it at that trial? Do you remember whether you did or not say anything about headaches and dizziness at that trial?

A. Yes, sir.

Q. You think you did?

A. I think so.

Q. This bruise that you had, this injury to your left elbow, there wasn't anything broken there, was there?
A. I don't know.
Q. Wasn't it just a bruise, Mr. Dahl?
A. That is what I called it, but I am not a surgeon, I don't know what a surgeon would call it.
Q. Didn't you hear the surgeon testifying at the last trial that it was just a bruise on your elbow, a contusion?
A. Yes, sir, a contusion.
Q. And you say that that contusion has pained you from the time of the accident down to the present time?
A. At times.
[fol. 51] Q. And the injury to your left foot, that was only a bruise, wasn't it?
A. Yes, sir.
Q. And that has pained you down to the present time?
A. Yes, sir.
Q. Does that foot injury bother you all the time or only occasionally?
A. After I walk much it swells up. Furthermore there is like a bone sticking up.
Q. A bone sticking out of your foot?
A. Yes, sir, there has been a fracture there.
Q. Point to the place?
A. (Witness indicates) On the front part of the ankle.
Q. On the front part of the ankle of the left foot?
A. Yes, sir.
Q. You were thoroughly examined in the hospital, weren't you, Mr. Dahl, the week that you were there?
A. No, sir.
Q. Didn't the doctors in the hospital look you over?
A. No, sir.
Q. Not at all?
A. No.
Q. Didn't Doctor Sheehan, your own doctor, look you over?
A. Dr. Sheehan looked me over.
Q. He looked at your ankle?
A. Yes, sir.
Q. And he looked at your elbow?
A. Yes, sir.
Q. And he looked you all over?
A. Yes.
Q. When did Dr. Sheehan first come to see you?
A. On February 12th.
Q. How long had you been out of the hospital at the time?
A. One week, I think.
Q. One week?
A. Yes, sir.
Q. And was it about the 15th of February that you walked from your home in Coles Street down to the Robins Dry Dock?

A. Yes, sir.

[fol. 52] Q. When Dr. Sheehan first came to you what did he do for you?

A. He gave me medicine to rub me with.

Q. Didn't put any bandages any place on you, did he?

A. Not at that time.

Q. And on the day that you took the walk down to the Robins Dry Dock, and you say it took you so long, was that because of your back?

A. It was because of my back and my leg, my left leg.

Q. Was there any bandage on your left leg when you walked down to the Robins Dry Dock?

A. No.

Q. Any bandage on your back?

A. No.

Q. Have you looked for employment since the last trial of this case?

A. No, sir.

Q. You haven't tried to get work of any kind?

A. I haven't been able to try.

Q. You haven't tried, Mr. Dahl, to get work of any kind?

A. No.

Q. How long had you been working for Robins Dry Dock when the accident happened?

A. I was working in the Robins Dry Dock about one year.

Q. Doing this same kind of work all the time?

A. Not always.

Q. You were a machinist's helper, is that right?

A. Yes, sir.

Q. Working on very many different ships coming into that yard?

A. Yes.

Q. And you did all of the work that they asked you to do down there, di-n't you?

A. Yes, sir.

Q. And that work frequently required you to stand on planks, isn't that so?

A. Yes.

Q. And it frequently required you to obtain those planks yourself, didn't it?

A. No, sir.

Q. Hadn't you ever at any time before this day gone and got [fol. 53] a plank to stand on?

A. Yes, sir, if I was sent for one.

Q. If you were sent for one?

A. Yes, sir.

Q. On the morning of this accident, when you came to the place where the grating had been removed, you saw that a plank would be necessary, didn't you, without being told?

A. Well I seen there was a plank necessary, yes, sir.

Q. And when Kilbride said, "Go and get a plank" he didn't

tell you where to go, he simply said, "Get a plank," am I right about that?

A. Yes, sir.

Q. And you and Kenny went and looked for a plank?

A. Yes, sir.

Q. And you say that two planks were brought to Kilbride and he rejected them?

A. Yes.

Q. He rejected them because they were too short, didn't he?

A. Yes, sir.

Q. They weren't long enough to cover the place that they were required to cover, is that right?

A. Yes, sir.

Q. In other words, the men who had selected those planks hadn't measured with their eye properly the space which was to be covered, and the planks were too short, am I right about that?

A. Yes, sir, I guess so.

Q. How far from the place where the grading had been removed was it that you found the plank which you afterwards brought over to Kilbride?

A. About forty or fifty feet.

Q. You said thirty-five at the last trial, that is about right, isn't it, Mr. Dahl, about thirty-five feet away from where?

A. I couldn't tell.

Q. I am only asking you for your best recollection, we don't want to [fol. 54] be particular about it, but you said about thirty-five feet, is that about right?

A. Thirty-five or forty.

Q. Thirty-five to fifty?

A. Maybe.

Q. When you and Kenny found that plank thirty-five to fifty feet away from the opening that it was intended to cover, you didn't look any further, did you, you didn't seek for any other planks?

A. We had been all over and looked everywhere.

Q. I am asking you this question: You went thirty-five feet away from the opening and you found a plank. Having found that plank did you look for any others after finding that one?

A. No.

Q. And when you saw that plank lying there, was it lying on the same deck that the grating had been removed from?

A. Yes, sir.

Q. The same level?

A. Yes, sir.

Q. And what kind of a plank was it; how did it look to you?

A. It was a two-inch plank, about fourteen to sixteen feet long, eight or ten inches wide.

Q. You didn't measure the thickness of it, did you?

A. No.

Q. It may have been a little bit more than two inches in thickness?

A. More or less.

Q. Was it a new plank?

A. Yes, sir.

Q. And was it the same kind of a plank which you had used for that same purpose right along while you had been working in the Robins Dry Dock?

A. To my opinion it was.

Q. And that is why you and Kenny picked up that plank and brought it over to Kilbride to cover this opening?

A. Yes, sir.

Q. And Kilbride took hold of one end of it, did he, and laid it [fol. 55] down on the beams upon which the iron grading had been resting?

A. Yes, sir.

Q. And you laid your end on the other beam?

A. Yes, sir.

Q. What do you think, Mr. Dahl, was the space which was covered by the board between those two beams? Do you understand what I mean, the length of the space?

A. About ten feet, about eight or ten feet.

Q. Do you mean that that was the length of the grating which had been taken up, eight or ten feet?

A. Yes, sir.

Q. But this plank didn't cover that entire space, did it? I mean weren't the beams upon which the grating was resting only about six or six and a half feet apart?

A. Yes, sir, about six or eight feet apart.

Q. Between six and eight feet?

A. Yes, sir.

Q. So that the opening covered by a part of the plank which you and Kenny brought over to Kilbride was between six and eight feet?

A. Yes, sir.

Q. After having placed the plank there you went out on the deck?

A. Yes, sir.

Q. Did you see Mr. Kilbride go and stand on the plank which you and he had placed there?

A. Yes, sir.

Q. Was he standing about in the center of the space?

A. No, he was standing on one end.

Q. He went out and stood on the plank, on that part of the plank which was between the two cross-pieces?

A. He was standing more on the end, standing more on one end.

Q. I understand that when you stepped on this plank that at that time the valve was hanging over the plank?

A. Yes, sir.

[fol. 56] Q. And isn't it a fact, Mr. Dahl, that the moment you put your weight on the plank it broke and you went down?

A. Yes.

Q. Just as soon as you stepped on it?

A. Yes.

Q. There was no cracking or no warning of any kind?
A. No.
Q. It was a clean break?
A. Yes.
Q. There was no weight at all of the valve on the plank, was there?
A. I couldn't tell.
Q. You know that it was hanging above the plank, don't you?
A. Yes, sir.
Q. So there couldn't have been any weight of the valve in any way resting on the plank?
A. Well, I don't know.
Q. You don't know that?
A. No.
Q. Had you touched the valve at all?
A. No.
Q. Did you see Kilbride touching the valve?
A. Yes.
Q. What was he doing with it?
A. Trying to get a sleeve around it.
Q. Putting a rope or chain around it?
A. Yes, sir.
Q. You mean that he had a rope or chain in his hand putting it around the valve?
A. Yes, sir.
Q. You and Kenny going to get this plank after being told by Kilbride to do it, obtaining the plank which you have just described to the Court and jury, placing it in the place where you did place it, is just what you had done many times before in Robins Dry Dock, isn't it?
A. Yes, sir.
Q. When you brought the plank over to Kilbride just what did you say to him about it?
A. I asked Kilbride how that plank looked to him.
Q. And what did he say?
A. He said, "It is all right."
[fol. 57] Q. And when you and Kenny found the plank lying on the ship, did you and Kenny say anything about it to one another?
A. "I think that plank is all right."
Q. You said that to Kenny, or he said that to you, which?
A. He said that to me.
Q. Kenny said to you he thinks the plank looks all right, did he?
A. Yes, sir.
Q. And what did you say to that, Mr. Dahl?
A. "Well, it looks all right."
Q. You said it looked all right?
A. Yes.
Q. Was that plank you found aft of the engine room or forward?

A. It was aft of the engine room.
Q. So that the furthest aft you went looking for a plank on that deck was thirty-five to fifty feet, am I right about that?
A. Yes, sir; it may have been more.
Q. What is you best recollection of it, that you went thirty-five or fifty feet aft of the engine room and found this plank?
A. Yes, sir.
Q. Mr. Dahl, you came up the ladder from the place where you fell, didn't you, to get on deck?
A. I don't know.
Q. The only way that you could get up out of a hold was by means of the iron ladder, wasn't it, running up to the deck, the ship's ladder?
A. I don't know which way I came up.
Q. I didn't ask you that at this time, Mr. Dahl, I said that is the only way to get up out of this place where you fell, wasn't it?
A. Yes.
Q. Don't you know how you went from the ship to the hospital?
A. No.
Q. Didn't you walk down?
A. I was told they carried me down.
[fol. 58] Q. You don't know whether you walked or were carried?
A. No.
Q. Are you wearing any surgical appliance at the present time?
A. No.
Q. You say that you have a hernia?
A. Yes.
Q. Have you had any treatment whatever for it?
A. No.
Q. How many times since the last trial of this action, April 24th and 25th, 1922, have you seen Dr. Sheehan?
A. About five times.
Q. Five times in twelve months?
A. Yes.
Q. What has he done for you during those five visits?
A. Prescribed some medicine to rub me with.
Q. To rub your back?
A. Rub my whole body.
Q. You didn't have to rub your whole body, did you, Mr. Dahl? Is the medicine that he gives you for your back or what is it for?
A. For my pains.
Q. Does he give you medicine to rub on your hernia?
A. No.
Q. Have you seen any doctor other than Dr. Sheehan since the last trial of this action?
A. Not for——
Q. For any purpose whatever?
A. Yes.
Q. Who was that?
A. An X-ray doctor.

Q. Since the last trial?
A. Yes.
Q. Dr. Rendich?
A. No.
Q. Who is the X-ray doctor?
A. Dr. Crane.
Q. How long ago did you see the X-ray doctor?
A. About two weeks.
Q. Were you sent to him by your lawyer?
A. Yes, sir.
Q. Did he take an X-ray of any part of you other than your back?
A. Of my arm and my left foot.
[fol. 59] Q. Dr. Sheehan attended your arm and left foot more than three years ago, didn't he?
A. Yes, sir.
Q. Did you ever, while you were a sailor, meet with any injuries, Mr. Dahl?
A. No, sir.
Q. Never had a fall of any kind?
A. No.
Q. Or at any time before you worked for the Robins Dry Dock & Repair Co?
A. Never had a fall.
Q. You never had an injury?
A. Yes, sir.
Q. When?
A. I had an injury to my hand.
Q. An injury to your right hand?
A. Yes, sir.
Q. When?
A. At the time that the Woolworth building foundation was put up.
Q. What kind of work were you doing there?
A. Working on a foundation.
Q. Just laboring?
A. Yes, sir.
Q. How did the accident happen?
A. It happened by a twisted wire on my hand, I got afoul of a twisted wire.
Q. Did it cause you to fall down?
A. No.
Q. Was it a wire that was charged with electricity?
A. No, it was a wire that was twisted around, twisted two wires together.
Q. How did you get your hand mixed up with it, that is what we want to know?
A. There was a stick between the two twisted wires, my hand caught on that stick that held those twisted wires, and the stick came loose and my hand went around the twisted wire, that is all.

Redirect examination by Mr. Burke:

Q. When you say you have been painting fences, Mr. Dahl, for four years, tell us where the fences were that you worked on?
[fol. 60] A. On the Guggenheim estate and Howard Gould's estate, Port Washington.

Q. The Guggenheim estate and the Gould estate on Long Island?

A. Yes.

Q. And they had fences around their golf links and various divisions of their estates?

A. Every five or ten acres is a fence.

Q. And you spent some four seasons down there painting those fences?

A. Yes, sir.

Q. When you had the X-ray taken by Dr. Crane, he didn't take any X-ray of your back at all, did he?

A. No, sir.

Q. He took an X-ray of your left elbow and an X-ray of your left foot?

A. Yes, sir.

Q. You have seen the X-rays that he took, have you, you have seen the X-ray pictures that he took of them?

A. Yes.

Q. Look at these and see if they are the two that he took?

By Mr. Brennan: I don't see how this witness can testify as to them.

The Court: Objection sustained.

Q. When you went to look for this plank, or rather found this plank, was that the only plank that you could find on either the aft or fore of the ship?

By Mr. Brennan: Objected to as incompetent, immaterial and irrelevant, it appears by the evidence of this witness that he went thirty-five to fifty feet of the place it was needed, and that he found [fol. 61] a plank which to him was apparently good, and he brought it back. Whether there were a thousand other planks there is immaterial.

The Court: I think so. Objection sustained.

Q. When you went thirty-five to fifty feet to look for a plank, did you mean thirty-five to fifty feet from what point on the ship?

A. From the engine room.

Q. How long is the engine room?

A. It is about two-thirds of the ship aft.

Q. It is about two-thirds of the length of the ship——

The Court: Two-thirds of the ship aft. In other words it is two-thirds back from the bow of the boat?

The Witness: Yes.

Q. Its length is equal to about two-thirds of the length of the bow of the boat?

The Court: He didn't say that.

Q. Will you tell us in feet, if you have any idea give us it in feet how long the engine room was from one end of it to the other?
A. I don't know how long the ship was.
Q. You saw this engine room. Can't you give us your best judgment without knowing how long the ship was?
A. The engine room is behind the middle part of the ship.
Q. Would you say the engine room was 100 feet long?
A. No.
[fol. 62] Q. If you don't think it was 100 feet long, how long do you think it was?

By Mr. Brennan: If the purpose is to get the distance that he went from the opening in the grating to the place where he found the plank, I have no objection to Counsel asking him that question without wasting all this time; that must be the object of it.
He testified that the distance from the place, the opening in the grating to where he found the plank was thirty-five to fifty feet.
The Court: I don't see that it makes any difference how far he went. We are concerned with this plank, whether in permitting the use of it the defendant was negligent, and whether in the use of it the plaintiff was also guilty of negligence. That is all we are concerned with. He took this plank. Whether he could have gotten other planks by seeking further, or getting one nearer, is immaterial.

Q. From the point where you found this particular plank in question to the very end of the boat, how far in your judgment was it?

Mr. Brennan: Which end?
Mr. Burke: He went to the aft when he got the plank.

A. About seventy-five feet.

[fol. 63] PATRICK KENNY, being duly sworn, testified as follows:

Direct examination by Mr. Burke:

Q. Where do you live?
A. 68 Third Street, Brooklyn.
Q. Mr. Kenny, were you working on this ship El Occident on the day that the plaintiff met with an injury?
A. Yes, sir.
Q. The general work being done there was the transferring of valves from the deck outside into the engine room, is that right?
A. Yes, sir.
Q. Where were you at work during that morning after getting there at seven o'clock.
A. We raised a valve on a chain tackle outside of the deck, on the deck outside of the engine room, and we were transferring it into, lowering it down into its position in the engine room.

Q. And that was done by means of a chain tackle, wasn't it?
A. By two chain tackles and a love tackle also.
Q. Did you see the boards that were across this open space before they were removed that morning?
A. Yes, sir.
Q. What kind of boards were there?
A. There was some of them an inch thick and some of them probably an inch and a half.
Q. How long would you say this open space in this gallery or grating was?
A. About eight feet, as near as I could tell.
Q. About how wide was it?
A. About two foot four or five inches.
Q. Over three feet, between three and four feet?
[fol. 64] A. The grating wasn't over three feet, the space was about three feet.
Q. I am asking for the space?
A. Yes, sir.
Q. The grating itself was about how wide?
A. About two feet four or five.
Q. And the space you say——
A. About three feet as near as I can tell.
Q. Were you doing any work right near the place of accident, when the accident happened?
A. Yes.
Q. What were you doing?
A. I was using a small chain tackle outside in between decks to allow this valve to go in to hold it in position.
Q. Were you one of the men that had received directions from the foreman to go and search for a plank?
A. Yes, sir.
Q. When you first received those directions from the foreman what part of the ship did you go to?
A. Went forward.
Q. Did you find any plank up forward on the ship?
A. I found several short ones, which we thought weren't long enough.
Q. Were some planks brought back to Kilbride the foreman?
A. Yes, sir, some of the other men brought them back.
Q. What did he say about that?
A. He rejected them.
Q. Were you one of the men that went out on the second quest to the aft of the ship?
A. Yes, sir.
Q. And found this plank that you and Dahl brought back to the foreman?
A. Yes, sir.
Q. What was said by either one of you two to the foreman when that plank was brought back?
A. We took it back and I asked the foreman if it was all right, and he said, "Yes, it is all right, shove it in," so he takes the end

[fol. 65] that I had and Dahl held onto the other end, and we put it down to work on.

Q. Will you tell us what you know about how the accident happened?

A. Dahl went in to help Kilbride to put chain lashing or something around this valve, and Kilbridge held onto the chain tackle and he didn't go down, he held onto the main chain tackle and the deck.

Q. Did you go into the hold that Dahl had fallen into?

A. Some time afterwards, yes, sir.

Q. Were you one of the men that helped him out of there?

A. Not until he got in between decks, then I was one of the men that took him to the hospital.

Q. You don't know who was actually down who helped him up?

A. I don't know who brought him up, he was in the between decks and the foreman and somebody sent two of us to the hospital.

Q. About how far down from the place where the plank broke was it to the place where he fell?

A. I should judge about thirty feet.

Q. Did you see the plank that broke after it broke?

A. Yes.

Q. Will you describe what you saw about the plank at that time?

A. I saw a knot on the plank right near the edge on one side, and it ran crosswise in the plank, it was almost concealed in it, you could see about an inch on this knot which was cut off by the saw, and then it ran across the plank, and the plank broke almost straight across.

Q. This plank that you brought there was about how wide?

A. About eight inches, probably more, I am not sure.

[fol. 66] Q. It was about how thick, would you say?

A. Two inches.

Q. Can you take this book, and assuming it to be part of the plank, will you show us about where the knot started and how it ran?

A. On the side of the plank here near the edge, you could see about that much of the knot, and it ran egg shaped across the width of the plank, and it was concealed in the plank except this part of it.

The Court: How much of it was observable?

The Witness: About an inch or an inch and a half.

The Court: In diameter?

The Witness: Yes, sir.

The Court: In other words the part towards the edge of the plank was noticeable?

The Witness: Yes, sir.

The Court: That is the knot was noticeable?

The Witness: Yes, sir, on one side only.

The Court: And you say, after the plank broke, then you could see where the knot extended?

The Witness: Yes, sir, the knot there was only a shell across here, and a shell on the other side.

The Court: You couldn't see it by looking at it?
The Witness: No, only just this part of it.
The Court: Only on the edge?
The Witness: Yes, sir, only this part of it.

Q. When you had gone to the fore part of the ship on your first trip, can you state whether or not there were any suitable planks in [fol. 67] that part of the ship?

Mr. Brennan: Objected to.
The Court: Objection sustained.

Q. Were there any planks there besides the ones you brought?
A. No.

Mr. Brennan: Objected to and I move to strike out the answer.
The Court: Strike it out as immaterial.

Q. Did you do anything to assist Mr. Dahl after the injury?
A. After he had fallen, I took him up to the hospital.
Q. Was he walking or did you carry him?
A. We half carried him, he walked sometimes, he got kind of weak on the way up.
Q. Was anybody assisting him but you?
A. Yes, sir, one of the men that was helping there.
Q. And you left him at the emergency hospital?
A. Yes, sir.
Q. Were you there when the ambulance came and took him away?
A. No.
Q. Who was Kilbride, the man that gave you these directions about getting the planks?
A. Our boss, the boss rigger.
Q. Was he known as a foreman?
A. He was known as the boss rigger.
Q. How many did he have working under him?
A. Six at the time.
Q. Did you and the other men in that group of men take all your orders from Kilbride?
A. Yes, sir, on that job.
[fol. 68] Q. On that job?
A. On that particular job, yes, sir.

Cross-examination by Mr. Brennan:

Q. Kilbride was what you commonly knew on the dock there as a snapper, wasn't he?
A. Yes, sir.
Q. And a snapper works along with the gang of men, and he does practically the same work as the men?
A. He gives orders to the men to do the work.
Q. But he works with the men?
A. Yes, sir.
Q. As Kilbride was doing on this occasion?
A. Yes, sir.

Q. Are you still working for the Dry Dock Company?
A. No, sir.
Q. How long did you continue to work there after this accident happened?
A. I couldn't really say, I may have been there three months, or something like that.
Q. Before the accident happened how long had you been working there?
A. Two years and half.
Q. As a rigger's helper?
A. Machinist's helper.
Q. And as a machinist's helper you had frequently done work just as you were doing that day when Mr. Dahl was hurt?
A. Well just the same as on a job, you have to do it or they sack you.
Q. You were doing this same kind of work on different ships right straight along down there?
A. On some occasions, yes, sir.
Q. That is you found it necessary occasionally to get a plank and stand on it to do whatever work you were supposed to do, am I right about that?
[fol. 69] A. The boss rigger used to generally inspect those planks.

The Court: No. The question is did you have to do that same kind of work before?
The Witness: Yes, sir.
The Court: In other words to use planks as a sort of bridge or scaffold?
The Witness: I never used them.
The Court: But you have seen them on the job?
The Witness: I have seen it done, yes, sir.
The Court: Lots of times?
The Witness: Yes.

Q. This was in the morning that this accident happened?
A. Yes.
Q. On this morning when you brought this plank over to Kilbride, and showed it to him, he said it was all right, it was laid down there, and Kilbride himself stepped on it, didn't he, or walked on it?
A. Yes, sir.
Q. And that you had seen done before, hadn't you, that very same thing?
A. I have seen those planks tested before.
Q. I am asking you this particular question: Had you seen that very same thing done before?
A. On several occasions, yes, sir.
Q. Had you used, with other workmen there, secured planks and placed them over openings just such as this was, and then stood on them yourself?
A. Yes, sir.
Q. And you had to do that quite often in the course of your duties down there, didn't you?

[fol. 70] A. Not very often, it is only when we are short of men that they sent machinists' helpers on those jobs.

Q. Machinists' helpers had to do some work didn't they?

A. They had to help the machinists.

Q. Wasn't it occasionally necessary for the machinists and their helpers to do work just as you were doing this morning when the accident happened?

A. The riggers always does that work except when they are short of men.

Q. Wasn't it necessary at times for the machinists to do it, and their helpers?

A. No, the machinists never done it.

Q. But their helpers, the machinists' helpers?

A. Yes, sir.

Q. As a matter of fact wasn't a machinist's helper known as a rigger's helper as well?

A. No.

Q. Mr. Dahl says he was known as both. You don't agree with him?

A. No, I don't agree that a machinist's helper is a rigger.

Q. You noticed that there was a plank needed there?

A. Yes, sir.

Q. And from your experience, if Kilbride hadn't been there at all, you would have gone and looked for a plank and brought it back, wouldn't you?

A. Not without I got orders.

Q. Not without somebody telling you?

A. No, sir, because we were taken up out of the engine room to do that.

Q. At any rate when Kilbride did it you went and got a plank that you thought was all right?

A. Yes, sir.

Q. When you came to this plank what did you say to Dahl about it?

A. I said, "We will take it to the rigger and see if it was all right."

Q. You knew, before you started to look for him, that it was long enough?

[fol. 71] A. Yes, I knew it was long enough.

Q. And you found it on the same deck where the grating had been removed?

A. Yes, sir, in the between decks in the same place.

Q. Didn't you say to Dahl, "This plank is all right"?

A. No, I didn't say it because I didn't know.

Q. You didn't know?

A. No.

Q. What kind of a plank was it?

A. Two inch plank.

Q. Was it a new plank?

A. Yes, sir.

Q. Was it the same kind of plank that you had always used for that purpose?

A. It was about the same thickness as I have seen them use before.

Q. Was it the same thickness and the same looking plank that you yourself had stood on before?

A. I have stood on them, yes, sir. They were examined when they were put in.

Q. What do you mean when you say to this jury that you didn't know whether that plank was all right or not?

A. No, sir, I didn't know.

Q. You looked at it and saw it was a new plank, didn't you?

A. I looked at it, but afterwards I saw——

Q. Wait a minute; answer the question; not what happened afterwards; we all know it broke; but when you looked at it didn't it look new to you?

A. It looked new, yes, sir.

Q. Didn't it look like the planks that you had always used for this purpose, the same thickness and the same appearance?

A. It looked like planks I have seen, yes, sir. I have never used planks.

Q. You never used planks?

A. Not to step on them. When I had to go in and out of [fol. 72] machinery I had to step on, I might be sent to get one and put them in. We got to do what we are told there.

Q. You told us half a dozen times that you have been repeatedly sent for planks and brought them to the place they were to be put, and put them in position you have done that?

A. Yes, sir.

Q. Many times?

A. Yes, sir.

Q. Then you have afterwards stood on them yourself, or walked on them?

A. I have brought them to the boss rigger——

Q. Wait a minute, I didn't ask you whether you brought them to the boss rigger or not?

A. No.

Q. When you brought them to where they were placed, did you walk on them?

A. Yes, sir.

Q. Were the planks that you brought on those occasions, and walked on, the same as the plank that you and Dahl brought to Kilbride that morning?

A. They seemed to be the same thickness.

Q. And this was a new one, a new plank?

A. It looked new to me.

Q. It looked new to you?

A. Yes sir.

Q. And it looked in every way to you to be the same as planks which you had formerly before that time brought for the same purpose, didn't it?

A. It looked to me about the same thickness.

Q. Did you see any knots in it?

A. Not at that time, no, until after it was broke.

Q. You couldn't see any until after it was broke, could you?
A. Yes, you could see one little piece on the side near the edge.
Q. On top of the plank?
A. On some side of it, I couldn't say which side, after we examined it we seen it.
Q. What do you mean, on the top or on the bottom?
[fol. 73] A. On top or bottom, near the edge, yes, sir.
Q. Supposing this book to be the plank, it was either on this side or on this side?
A. Yes, sir.
Q. Not on the edge?
A. Not on the edge, right near the edge.
Q. When you looked at the plank after the accident did you see any other knot any place on it other than the one that you have told the Court and jury about?
A. No, I didn't see any more.
Q. Did you look for another knot?
A. I am not positive of that, I just looked at that knot.
Q. The knot that you are speaking of ran right across the board in the interior?
A. Yes, sir, mostly.
Q. And the only place where you could see it on top was about an inch, I think you said, or an inch and a half, which was it?
A. In diameter right near the edge.
Q. Was it an inch or an inch and a half?
A. An inch, or an inch and a half at the most.
Q. You don't know what kind of wood it was made of, do you?
A. No, sir.
Q. How many days had you been working on this particular job?
A. I think I worked about four or five days to the best of my belief on that particular job, maybe six.
Q. And during those four or five or six days were you a rigger's helper?
A. I was helping the machinists.
Q. I didn't ask you that, I asked you a simple question, you can say "Yes" or "No"?
A. No.
Q. You weren't a rigger's helper?
A. No.
Q. Were you doing the work of a rigger's helper on that ship during those six days?
A. No, sir.
[fol. 74] Do you remember being asked this question at the last trial, and making the following answer:
Q. "As a matter of fact the work you were doing on this particular job was rigger's helper? A. Rigger's helper." Do you remember that question and answer?
A. On this particular job, yes, sir.
Q. That is all I ask you. For the five or six days before this accident you were working on this job as a rigger's helper?
A. On this one job putting in the valve was the only time I was working as a rigger's helper, on that job.

Q. The five or six days that you were working on this ship on this job were you a rigger's helper?

A. No.

Q. Do you mean then that only on the job of bringing in this valve you were a rigger's helper?

A. That is all.

Q. How long did that take?

A. By helping take out any such stuff as that.

The Court: How long did that take?

The Witness: About an hour and a half to get it in, I am sure.

Q. Didn't you say, at the last trial, that you had been working with Dahl and Kilbride on this job for seven or eight days?

A. Probably I did.

Q. Those seven or eight days you were doing the work of a rigger's helper, weren't you?

A. No, helping the machinists.

Q. All of those seven or eight days you were taking engine parts out of the ship and putting them back again?

A. That is helping the machinist.

[fol. 75] Q. That is machinist's work, is it?

A. It is helper's work, taking it to the shop and taking it back.

Q. During those seven or eight days you were taking parts of machinery out of the ship through this grating and putting them in again?

A. Yes, sir.

Q. And you were using planking there every day?

A. If they were light pieces we would take them up the ladder.

Q. Pieces that weren't light you hoisted up?

A. Yes, sir.

Q. Some of them came up through this space where the grating had been removed, some parts?

A. Kilbride used to take them out and we took them to the shop.

Q. And in order to take those things out, sometimes you had to remove planking to make room for the parts to come up through the grating?

A. Yes, sir.

Q. All of those seven or eight days you were working around this place, and moving these planks frequently, weren't you?

A. No, I don't think they were moved during the time I was there before that morning.

Q. During the seven or eight days you have just told us, Mr. Kenny, you had to take things up through that very space where the planks were?

A. Yes, sir, we used some light planks because they were light pieces before that.

Q. But you had to move them?

A. Yes, sir, and pushed them back again to step on them.

Q. And the planks you were moving about those seven or eight

days, were the same as the plank that you and Dahl brought over [fol. 76] to Kilbride that day?

A. They weren't, they were inch planks, an inch and a half.

Q. You don't mean to say you were standing on inch plank?

A. Yes, sir.

Q. Standing on inch planks handling machinery?

A. We weren't standing, just to step inside of the engine room and then step on the grating, just put one foot there and then step on the solid grating. They were probably maybe an inch and a half, but they were no more.

Q. I understand you to say on those planks that you had been using for seven or eight days, you wouldn't stand, you just simply walked across them or stepped on them?

A. Yes, sir, stepped on them.

Q. But when you wanted a plank to stand on to work, then you got the two inch planks?

A. Yes, sir that is what he sent us for, that plank.

Q. When you went down where Dahl had fallen, you didn't put the two ends of the plank together did you, Mr. Kenny?

A. No, I just looked at them.

Q. What do you say as to the space that was covered by this plank, that is the span between the two cross pieces?

A. About eight feet.

Q. And you didn't measure the plank, did you?

A. No, but I judge it to be about sixteen feet long.

Q. And you judge it to be about two inches thick?

A. Yes, sir.

Q. It might have been a little more?

A. I don't think so; it might be, I didn't measure it.

Q. You didn't measure it, as you say?

A. No.

[fol. 77] Redirect examination by Mr. Burke:

Q. Do you remember this question and answer at the last trial: "All those seven or eight days you were taking machinery out of the engine room and putting machinery in, engine parts?

A. I was helping the machinists the biggest part of the time." Do you remember giving that answer to that question?

A. Yes, sir.

RICHARD A. RENDICH, being duly sworn, testified, as follows:

Direct examination by Mr. Burke:

Q. Where do you live?

A. 184 Jeralemon Street, Brooklyn.

Q. Dr. Rendich, how long have you been admitted to practice medicine and surgery in this State?

A. About ten years.

Q. Have you made any specialty in your profession?
A. Yes, sir.
Q. What is that?
A. X-Ray.
Q. Will you tell us what experience you have had in the line of X-Ray work?

A. At the present time I am roentgenologist to the Bellevue Hospital, roentgenologist to the Brooklyn Eye & Ear Hospital, consulting roentgenologist to the Manhattan State Hospital, and radio therepeutist to the Polhemus Clinic.

Q. You have also had some experience in X-Ray work during the war?
A. Yes.
Q. What camp were you attached to there?
A. Overseas and Base Hospital 37.

[fol. 78] Q. On or about March 6th, 1920, did you take X-Ray pictures of the lower part of the plaintiff Lars Dahl?
A. Yes.
Q. I ask you to look at these two pictures, Doctor, and tell me if they are the ones that you took at that time?

A. Yes, sir, they both show about the same condition, the fracture. It is a cortical fracture of the left side of the body, of the fourth lumbar vertebræ this fragment representing the fracture.

Q. Will you show the other one, Doctor, and see if it shows there, and point out where it shows?

A. (Indicating) That is the same condition as shown on the other.

Q. What would you describe that as, that fracture?
A. Cortical fracture of the upper portion of the body, of the fourth lumbar vertebræ.

Q. Is there a fragment of bone which protrudes out from the left border of the fourth lumbar vertebræ near its surface?
A. Yes, sir.
Q. Do you recall about what size that fragment is from seeing it on the plate?

A. Just this moment I would judge it to be about three-eighths of an inch, or probably one-eighth roughly.

Q. Take the point of the fourth lumbar vertebræ section in its normal condition, are there ligaments attached to it?
A. Yes, sir.
Q. Will you tell us what effect the fracture had on those ligaments?

A. This particular point is the insertion of the psoas muscle, and this type of fracture is the usual result of a contraction of that muscle, with tearing away of portion of the bone to which it is inserted.

Q. And ones that is torn away that way, Doctor, is there any way [fol. 79] to get it back into its normal condition, that you know of?

A. I know of no means by which we could get it back in position as it was prior to that.

Q. That was a necessarily painful injury, wasn't it?

A. Yes, sir.
Q. Is that condition which is shown on the X-Ray, the protruding fracture of the bone, is that a permanent condition?
A. Yes, sir.

The Court: These pictures were taken March 5th, 1920?
The Witness: Yes, sir.
Mr. Burke: I offer these two X-Ray plates in evidence.
The Court: Considered marked "1," and "2."

Cross-examination by Mr. Brennan:

Q. Were these photographs taken in your office or at the home of Mr. Dahl?
A. In my office.
Q. Where was your office at that time?
A. 184 Joralemon Street.
Q. Did the plaintiff come along to your office, do you recall that?
A. I don't recall.
Q. You don't recall either how he came to your office, whether he walked or rode or how he got there?
A. No, sir, I do not.
Q. When he came there did he complain of anything else besides the back?
A. Not to me.
Q. Did you make any general examination of him, Doctor?
A. No, sir.
Q. Just why did you take a photograph of the back?
[fol. 80] A. Because he had been referred for that examination.
Q. By whom?
A. By Mr. Sheehan.
Q. Dr. Sheehan just requested you to make a photograph of his back?
A. Yes.
Q. And of nothing else?
A. No, sir.
Q. So that so far as your part of this transaction is concerned, Doctor, you had nothing to do with any other injury that he might have sustained, if any?
A. Yes, sir.
Q. Doctor, you are just as good a roentgenologist to-day as you were on the 5th of March, 1920, aren't you, perhaps better?
A. I hope so.
Q. If anything you have learned something since that time?
A. Yes, sir.
Q. And you consider yourself just as competent to take a picture of this man's elbow and ankle to-day as you were in March, 1920?
A. Yes, sir.
Q. And you have taken no such photograph?
A. No, sir.
Q. And your office is still in Joralemon Street?
A. Yes, sir.

Q. You say that you know of no way to get this muscle, or whatever it is—what was it that you were referring to, Doctor, when you said you knew no way to get it back in position?

A. That fragment of the cortex, that is the outer covering of the body of the spine, of one of the segments of the spine.

Q. And the reason is that there is a muscle that is torn?

A. Yes, sir.

Q. And you knew that, Doctor, on the 5th of March, didn't you, and you so reported it to Dr. Sheehan?

A. Yes, sir.

[fol. 81] Q. What would have been the proper treatment at that time for that condition?

A. That was some time after the injury, and of course much depends on the physical aspect of the case as to say what would be the treatment.

Q. Doctor, on the 5th of March, when you took these photographs, and since you examined the pictures, and saw what the result was, you reported it to Dr. Sheehan, didn't you?

A. Yes, sir.

Q. And when would that be, about the 7th of March?

A. About two days later ordinarily.

Q. At the time that you reported it to Dr. Sheehan, did you show him the photographs or did you simply report what the photographs indicated?

A. I just made a report.

Q. And what, in your opinion as a physician, would have been the proper treatment for that condition at that time?

A. At that time of course it being some time after the examination, after the injury, I would be guided entirely by his clinical aspect, I mean what a physical examination would show. I mean by that I do not feel we could say from the X-ray alone just what should be the particular indications and treatment in all cases.

Q. What, in your opinion, Doctor, this being about a month after the accident, what, in your opinion, would have been the proper treatment at that time from the examination that you made of him?

A. From the examination that I made alone—of course I probably do not make myself clear, but I mean that the real indication for treatment would depend upon how much pain the man was [fol. 82] having for instance how much disability he was having. If they were marked I would suggest immobilization; if they were not marked then I would treat him more conservatively.

Q. If the symptoms were marked the symptoms of disability and pain were marked, you would immobilize the patient's back?

A. Yes.

Q. How would you do that?

A. By strapping it.

Q. How long would you continue that treatment, Doctor?

A. At least a couple of weeks after that particular time.

The Court: You would use the same treatment as for a fracture of any other part of the body?

The Witness: Yes, your Honor, immobilize it.

Q. How did the patient appear to you at the time of your examination, was he suffering pain, was he in bad condition at that time?

A. The details I don't remember of the patient's condition.

Q. You did testify, Doctor, at the last trial, that in your opinion the proper treatment for the condition which existed at the time of your examination was immobilization strapping?

A. Yes.

Q. And that in your opinion was the proper treatment?

A. Yes.

Q. You wouldn't permit or advise this man at that time to go walking around the streets of the City, would you?

A. No.

Redirect examination by Mr. Burke:

Q. Will you kindly tell me the name of that muscle that is attached to that particular vertebræ?

A. Psoas magnus.

[fol. 83] GEORGE A. SHEEHAN, being duly sworn, testified as follows:

Direct examination by Mr. Burke:

Q. Where do you live?

A. 429 Clinton Street, Brooklyn.

Q. Dr. Sheehan how long have you been practicing medicine and surgery in this State?

A. Eight years.

Q. Your office during that time was in Clinton Street?

A. Yes.

Q. Do you remember being called in to treat the plaintiff here, Lars Dahl?

A. I do.

Q. In February, 1920?

A. I do.

Q. Do you recall the exact date that you first saw him after the injury?

A. February 12th, 1920.

Q. You made an examination of him at that time?

A. I did.

Q. Will you tell us what your examination disclosed and what his condition was?

A. At that time he was suffering from a laceration of the scalp and a sprain of the left foot in front of the ankle, which was swollen and tender. He had a contusion of his left elbow, which was swollen and tender. He had a laceration of the left side of his rectum about one-half to three-quarters of an inch in length, and a

severe pain in his back, and he complained of headache and sleeplessness.

Q. What treatment did you give him at that time?

A. I put him on a light diet and put him to bed and told him to use hot applications and liniments.

Q. And that is the treatment that was indicated to you at the time?

A. It was.

[fol. 84] Q. You continued to see him for how long afterwards?

A. For about ten days, and then he was taken out of my hands by the Insurance Company, and I didn't see him again for the next ten days, and then he came back to me again, that was about the beginning of March.

The Court: By the "Insurance Company" what do you mean, the Workmen's Compensation?

The Witness: Yes, sir, they sent their own doctor, and took him out of my hands.

Q. Have you seen him off and on down to the present time for this condition that he has?

A. I have.

Q. As you had him under your care there, as you say he came back to you after a period of ten days, will you tell us what progress you made in his treatment, and how his condition progressed?

A. The swelling of the foot and elbow were improved, although he still complained of some pain in his foot and elbow. The laceration of his rectum was healed. The remaining symptoms that he had at that time were weakness in his arm and leg, and this pain in his back and a headache, those were the principal things he complained of. The laceration of his head had healed.

Q. When this wound near his rectum healed, did it leave scar tissue?

A. Yes, sir.

Q. That is a permanent condition?

A. Yes, sir.

Q. This was tender and plainful?

A. Yes, sir.

Q. He testified that since the time of this injury down to the present time he has suffered from headaches, and dizziness, and that [fol. 85] he did not have them at all before the time of this injury. Those headaches and pains in the head having persisted down to the present time, can you, in your opinion with reasonable certainty, say that they are permanent?

A. I cannot.

Q. The cortical fracture of the upper border of the fourth lumbar vertebræ, would that be a sufficient and competent producing cause for the pain Mr. Dahl says he suffers in the back?

Mr. Brennan: Objected to; this witness has not testified to any such condition.

The Court: Objection sustained.

Q. You examined the plaintiff's back?
A. I did.
Q. Did you diagnose it as a fracture of that——

Mr. Brennan: Objected to as leading.
The Court: Objection sustained.

Q. What was your diagnosis of the injury to the back?
A. I found pain over his spine, and any spine injury is very difficult to diagnose a fracture of the spine because the spine is so *firmly fixed together* by muscle and ligaments——

Mr. Brennan: You were asked what you found. Please tell us?

Q. Go ahead, Doctor?
A. It is so firmly fixed together by ligaments and muscle that you cannot move them like a bone in the arm that you can move back and forth.

Mr. Brennan: Objected to, the question is simply what did he find.
[fol. 86] The Court: In other words you could not accurately determine what the situation was?
The Witness: Without an X-ray picture.
The Court: And you used an X-ray picture to determine it?
The Witness: Yes, sir.
The Court: And you had X-ray pictures taken?
The Witness: I did.
The Court: And you directed the doctor to X-ray his back?
The Witness: Yes, sir.
The Court: Did you see the X-ray pictures afterwards?
The Witness: Yes, sir.
The Court: And as a result of your own diagnosis, amplified by the X-ray pictures, what could you say the patient was suffering from?
The Witness: He was suffering from a cortical fracture of the fourth lumbar vertebræ.

Q. Is that sufficient, in your opinion, a competent producing cause for pain which he says he has suffered at all times since the injury down to the present time, pain in the back?
A. It is.
Q. Is that condition a sufficient and competent reason for causing him pain in the back when he attempts to lift anything?
A. It is.
Q. Can you say, in your opinion, with reasonable certainty, Doctor, whether or not, having that condition that you have just mentioned, in his back, that he can do heavy work, lifting and stooping over?
A. He cannot.
[fol. 87] Q. In your opinion, with reasonable certainty, is that inability to do that heavy work permanent?
A. It is.

Q. Doctor, you have told us about everything. Did you find any hernia there?

A. I did.

Q. Just describe the kind of hernia?

A. He had a right inguinal hernia with some weakness of the abdominal wall on the right side.

Q. Would a fall from a plank which broke and permitted the plaintiff to drop a distance of some thirty feet, striking the hold of the vessel at the end of the fall, be a sufficient and competent producing cause for the hernia which you found?

A. *Yes, sir.*

Q. Is there any cure for hernia except trying an operation?

A. No. He can wear a truss.

Q. But that would only palliate it and not cure it?

A. Yes, sir.

Q. What is the fair and reasonable value of the services you rendered to the plaintiff since the time of this injury?

A. $150.

Cross-examination by Mr. Brennan:

Q. You are still attending him, aren't you, Doctor?

A. I am.

Q. When did you last see him?

A. About three days ago.

Q. Is the hernia still there?

A. It is.

Q. Is it in the same condition as it was when you first saw it?

A. I think it is, if anything I would say it was a little larger.

Q. Then it has not improved any under your treatment, has it?

A. It has not. Not from treatment, from advice.

[fol. 88] Q. I don't care what you call it, it hasn't improved any under it?

A. No, it has not.

Q. You say that your first examination of this man, Doctor, was on the 12th of February, is that right?

A. It was.

Q. And you saw him how often between the 12th and the end of February?

A. I saw him about every second or third day; really I couldn't say how often; every second or third day.

Q. And you found him in bed each time?

A. Yes, sir.

Q. Were you there on the 15th of February?

A. I couldn't say.

Q. You have records of this case, havn't you, in your office?

A. I don't think I have a record of the actual visits.

Q. No history of the case at all?

A. I have a history of the case, yes, sir.

Q. Haven't you a record showing the dates that you visited this man?

A. I haven't looked it up, I may have but I didn't look it up.

Q. How are you going to make out your bill?

A. I don't put the dates down, I just put the amounts.

Q. And you are still doing that?

A. Yes.

Q. You are willing to keep on treating this man until such time as he can pay you, is that right?

A. I am willing to keep on treating him as long as he is complaining.

Q. I don't mean any offense, Doctor, but if he should get any money out of this case you expect that he will pay you?

A. Yes, sir.

Q. And you are willing, as a physician, to continue treating him until such time waiting for your bill until he is able to pay you?

A. Yes, sir.

[fol. 89] Q. Therefore everything that you thought was necessary for you to do for him up to the present time, you have done?

A. Not altogether, I have hesitated.

Q. You have done the best you could for him?

A. I have.

Q. When you say you hesitated, do you mean you hesitated about operating for the hernia?

A. I have hesitated where there is any big expense incurred upon him.

Q. Anything that you might have wished to do in the nature of an operation, you could have done without any expense to him, couldn't you?

A. Yes, he could have been operated on.

Q. Has one single thing been done to this hernia since the first day that you saw it, that you know of?

A. There is nothing could be done excepting operation or a truss.

Q. Has anything been done in any way shape or form for that hernia?

A. That is really the only way I can answer the question.

Q. You can say whether it is or not?

The Court: It has or it has not?

The Witness: That would not be a truthful answer.

A. Nothing.

Q. Doctor, had you treated Mr. Dahl before this accident?

A. I don't remember.

Q. You don't remember ever having seen him before or having examined him before?

A. I don't remember, I may have, but I don't remember.

Q. Then you cannot tell us whether this hernia had been there for a week or for five years before you saw it?

A. I cannot.

[fol. 90] Q. Will you tell us, Doctor, just what the condition was of the left foot or ankle?

A. He had a swelling and contusion of his left ankle.

Q. Was it an extensive swelling?

A. Quite extensive.

Q. How long did it continue to be an extensive swelling?

A. It continued for about a month's time.

Q. During that month did you frequently examine it?

A. Yes, sir.

Q. You didn't suspect any fracture there, did you?

A. No.

Q. In fact you made up your mind that there wasn't any?

A. I did.

Q. And that is the reason you didn't ask Dr. Rendich to make any X-ray of the ankle?

A. Yes.

Q. And at the end of the month did that swelling entirely disappear?

A. As far as I could ascertain.

Q. And the ankle appeared to you to be normal?

A. Yes, sir.

Q. So after that time there was nothing that you could see which would cause any pain, or unevenness, about that ankle?

A. It was subjective.

Q. Nothing that you could see?

A. No.

Q. Simply that he said at times it pained him?

A. Yes, sir.

Q. And the left elbow, that was just a contusion?

A. Yes, sir.

Q. And that disappeared in a short time?

A. Yes.

Q. Nothing about that which would cause pain after three or four years after the receipt of an injury, was there?

A. Well, the thing is, in cases of that kind, it comes on after the [fol. 91] injury, the injury predisposes to some bone change following that after a certain length of time.

Q. You say it was a contusion, is that right?

A. Yes, sir.

Q. What is a contusion?

A. A contusion is a swelling, eccymosis of a part due to a blow.

Q. You said it disappeared in a short time?

A. Yes, sir.

Q. The evidence of it disappeared, the outward evidence of it?

A. Yes, sir.

Q. And you found no inflammation or anything there, did you?

A. No.

Q. So that after the discoloration disappeared the elbow looked normal?

A. Yes.

Q. There was no evidence of stiffness there, inflammation of any kind?

A. He complained of weakness in the arm.
Q. Weakness in the elbow?
A. In the arm.
Q. I am speaking of the elbow, did he complain of weakness in the elbow?
A. He didn't complain of weakness in the elbow, it was a matter of flexion and extension of the arm, the weakness centered in the elbow.
Q. Was there anything that you can tell the Court and jury which, in your opinion, would cause weakness or pain after the contusion had disappeared?
A. There was nothing at that time.
Q. Is there anything now?
A. Yes, sir, there is.
Q. When did you first discover whatever is the trouble now?
A. About a month ago.
Q. And you have been treating this man since February 12th 1920, and you only discovered this trouble, whatever it is, a month ago?
A. The man hasn't seen me since April, 1922, up to a month ago.
[fol. 92] Q. April, 1922, is the date of the last trial, isn't it?
A. Yes, sir.
Q. Since the last trial you never saw him until a month ago?
A. Yes, sir.
Q. How many times have you seen him since then?
A. Five times.
Q. Did he tell you how he hurt his left arm?
A. No.
Q. A month ago?
A. He told me how he hurt his arm?
Q. Yes?
A. He didn't hurt his arm a month ago.
Q. You treated it in 1920 until it was entirely cured, didn't you?
A. Yes.
Q. Then three years later you are called in, and you look at it again?
A. Yes, sir.
Q. What do you find there now?
A. He has, as far as I can ascertain from a physical examination, he had some bony change in his elbow and in his foot.
Q. Both places?
A. Yes, sir.
Q. Both injuries which you had cured three years ago you now find something wrong, bony changes?
A. Yes.

By Mr. Burke: Objected to on the ground that he has not testified that he healed them three years ago.
The Court: No, he treated them.

Q. What is wrong now?
A. As far as I can ascertain by external examination he has some bony changes in his elbow and in his left foot.

Q. What do you mean by bony changes; are there any broken bones?

[fol. 93] A. The contour of the bone isn't regular, it isn't smooth, it is irregular.

Q. What portion of the elbow?

A. The contour of the olecranon process.

Q. Where?

—. At the tip.

Q. Will you point that out to the jury?

A. Just at the point of the elbow, when you raise your elbow this tip that comes up.

Q. Right on the point of the elbow?

A. Yes, sir.

Q. Something wrong with the contour of it?

A. Yes, sir; irregular, depressed, rough.

The Court: You had not noticed that up to the time of the last trial?

The Witness: I had not.

Q. What is the matter with the ankle?

A. The contour of the ankle is irregulaar.

Q. In what way?

A. It is in comparison with the opposite ankle.

Q. In what way is it irregular?

A. It appears to be larger.

Q. How large is it?

A. That I couldn't say, I didn't measure it.

Q. How large is his right ankle?

A. I can't say.

Q. Why didn't you measure them?

A. I made that by comparison, palpation.

Q. An examination by palpation?

A. Or by feeling, by the use of the sense of touch.

Q. You say that one ankle appears larger than the other?

A. Yes, sir.

Q. Why didn't you measure it to make sure of it?

A. I didn't think there was any doubt about it.

[fol. 94] Q. What bone do you say there is irregular?

A. That I couldn't say. There is at least seven bones situated in the ankle joint, and I couldn't say which ones were affected, if any.

Q. Did you examine it after the last trial, the ankle?

A. No.

Q. Did you examine the elbow after the last trial?

A. No.

Q. Did you hear Dahl testify at the last trial that he had pain in both the ankle and the elbow right up to the time of the trial?

A. No.

Q. You didn't hear that?

A. No.

Q. You recommended Dr. Rendich to take the original photographs of his back, didn't you?

A. Yes, sir.

Q. Did you recommend any photographs of the ankle and elbow?

A. I did recommend photographs.

Q. When.

A. About two or three weeks ago.

Q. Who did you recommend that they be taken by?

A. I didn't recommend anybody, I recommended to Dahl that he should have them X-rayed.

Q. Doctor, at the time that you first saw this man on the 12th of February, 1920, the ankle was swollen and the back was very sore, wasn't it?

A. Yes, sir.

Q. So swollen that he couldn't walk on it?

A. Yes, sir.

Q. And it continued that way for how long?

A. It continued that way until—I saw him on the 22nd and I didn't see him again until the 2nd of March.

Q. How long did it continue so swollen that he couldn't walk on it?

A. I saw him on the 2nd of March; at that time he was walking.

[fol. 95] Q. So that you saw him every two or three days between the 12th of February and the end of February?

A. No, about the 22nd of February.

Q. Between the 12th and the 22nd did you see him at all?

A. Yes, sir, every two or three days.

Q. Between the 12th and the 22nd you saw him every two or three days in bed?

A. I did.

Q. And according to your observation at that time he was unable to walk?

A. Yes, sir.

Q. Both from the back and the leg injury?

A. Yes, sir.

Q. Would you be surprised that he did walk down to Robins Dry Dock on the 15th?

A. I would.

Q. According to your contention he wouldn't be able to do that, would he?

A. No.

Q. And you told him not to do anything like that?

A. I did.

Q. When did you first see the X-ray which Dr. Rendich took of this man's back?

A. I really couldn't say the date, it was early part of March.

Q. Right after it had been taken?

A. Yes, sir.

Q. And you concluded at that time that he had the fracture which Dr. Rendich's picture disclosed, according to his testimony?

A. I did.

Q. What did you do for him?
A. I strapped his back.
Q. Are you sure of that?
A. I testified, I think, on the last trial, that I didn't.
Q. I didn't ask you what you testified. Are you sure that you strapped his back?
A. I am not sure, I think I did, I wouldn't state positively.
Q. You believe that is the proper treatment?
A. Yes, sir. and I followed the proper treatment in this case. [fol. 96] In this case, If I followed my routine treatment, I would have strapped his back.
Q. You don't know whether you did it or not?
A. The possibilities are that I did because I followed the routine treatment.
Q. Did you tell him to go to Dr. Rendich's office on the 7th of March?
A. That I don't remember.
Q. You advised him to and have an X-ray taken?
A. I did.
Q. You don't know how he got to Dr. Rendich's office?
A. I do not.
Q. Doctor, you didn't say anything about headaches at the last trial, did you, about this man suffering from headaches?
A. That I don't remember.
Q. Don't you know that you didn't?
A. No, I don't, I think I did.

Court adjourned until 10 o'clock.

Friday, April 27th, 1923—10 a. m.

ALBERT J. HEUSEL, being duly sworn, testified as follows:

Direct examination by Mr. Burke:

Q. Where do you live?
A. 332 37th Street, Brooklyn.
Q. Mr. Heusel, have you worked as boss rigger?
A. Yes, sir.
Q. Had you worked as such prior to February, 1920?
A. Yes.
Q. And for how many years had you been doing the work of [fol. 97] boss rigger prior to February, 1920?
A. I have experience of fourteen years.
Q. Do you mean by that that you worked constantly, steadily for fourteen years as a boss rigger, or had you done other work?
A. Part of that time, say half of that time.
Q. About half the time of the fourteen years you have worked as a boss rigger?
A. Yes, sir.

Q. By boss rigger do you mean that you would be in charge of a gang?

A. Yes, charge of the gang.

Q. Did you work in various shipyards around Brooklyn?

A. I did.

Q. Will you name some of the different yards that you worked in?

A. Olson Iron Works, John N. Kuhns, Arthur Tickles, Crystal Iron Works, Stephen Ransom, Philip H. Gill, Cosmopolitan Line, Fitch, Shields & Moran, I took down a stack of 150 feet from the Ramberg shipyards, 400,000 brick, took it down in five weeks with another man. Edgett's Ship Repair.

Q. Are a number of those shipyards that you mentioned well-known shipyards around the water-front in Brooklyn?

A. They are.

Q. What other kind of work did you do during the fourteen years besides boss rigger?

A. I done work for myself as steeplejack.

Q. Did you do any other work in any of those shipyards that you have mentioned, apart from the work as boss rigger?

A. I did.

Q. What kind of work was it that you did?

A. Mostly rigging work.

Q. You say "rigging" as distinguished from being a boss rigger?

A. Yes, building the stagings.

[fol. 98] Q. You as a boss rigger, during those years that you worked as such, had done work around ships that were under construction and repair, had you not?

A. I did.

Q. That constituted a good part of your work as boss rigger around ships and on ships, I suppose?

A. Yes, sir.

Q. In February, 1920, was there a method in common ordinary use among——

A. Long before 1920.

Mr. Brennan: I move to strike out the answer.

The Court: Strike it out.

Q. Wait until I finish my question. In February, 1920, was there a method for testing the strength of planks used for scaffolding and staging around ship repair and construction work in common ordinary use?

A. Yes, sir, there was.

Mr. Brennan: I move to strike out the answer.

The Court: On what ground?

Mr. Brennan: On the ground that the witness has not been qualified to answer, on the ground that the question calls for incompetent, irrelevant and immaterial testimony.

The Court: Allowed.

Mr. Brennan: Exception.

Q. You may answer, was there such a method, Mr. Heusel?

A. Yes, sir.

[fol. 99] Q. And what was that method? If we were going to work on any staging or anything—

Q. Testing the strength of a plank for scaffolding?

Mr. Brennan: Objected to. The attention of the witness should be directed to the conditions which existed at the time of the happenings of this accident, he may be describing something entirely different.

The Court: Yes, I think you better lay the foundation for your question.

Mr. Burke: My question includes ship repairs and construction work.

Q. Assume, Mr. Heusel, that the work of transferring a valve, a cylinder valve belonging to the engine of the ship was being done, and the valve was being brought in from the between decks to the engine room through the passageway leading from the deck to the engine room, and that that valve was held up and moved along from the deck into the engine room by means of a chain tackle, and that there was a space of about seven to ten feet or eight to ten feet where an iron grating in the gallery running around the engine room, had been removed, and that it was necessary to bridge over that space in order that the men engaged in working about the valve could stand and do their work, and assume that that space was bridged over by planks. Was there, in February, 1920, a method commonly and ordinarily used for the purpose of testing such planks to be used in that space?

Mr. Brennan: I object to the question on the ground that it fails [fol. 100] to assume facts in evidence, fails to describe the plank such as was used for the purpose described, and fails to state other facts which are necessary to a proper solution of the question.

The Court: Insert that the plank is sixteen feet long, eight inches wide and about two inches thick, and bringing a space and resting upon two beams that are about from eight to ten feet apart, probably eight feet apart. Was it the customary thing, before using such a plank upon which men were to work to test such a plank?

The Witness: There were, your Honor.

Mr. Brennan: May I suggest that the question should further include the testimony of the plaintiff's witness that the plank was new and apparently in first class condition, and a plank which was ordinarily used for the same purpose, and that there is no evidence that there was a knot visible in the plank before it broke.

Mr. Burke: There is evidence.

Mr. Brennan: No.

The Court: Assuming the conditions just described by Counsel for the defendant, that this was a new plank was it customary in every case to test the plank?

The Witness: It was, yes, sir.

The Court: In other words, before you would use a plank as a scaffold you say at that time it was the customary and usual thing

to subject a plank, whether it was new of whether it was apparently in good shape or not, to certain tests?

[fol. 101] The Witness: Especially over any height.

The Court: It was always——

The Witness: The customary thing, yes, sir, to test the plank.

The Court: You may describe the customary and usual method of testing it?

Mr. Brennan: I move to strike out the answer on the grounds before stated.

The Court: Motion denied.

Mr. Brennan: Exception.

The Court: What was the method that was adopted at that time as the customary and usual method?

The Witness: You take a plank, assuming you are going to use it for that job or any other job, you take a plank and lay it on some object and you jump on it, and you test it out with your weight, and if there was any weak spot in that it would show, and then you turn it on the other side. And any man that knows his business, or ever done anything like it, will do it, and it is customary, always used.

Mr. Brennan: I move to strike out the latter part of the answer.

The Court: Strike it out.

Q. You would place the plank on some object?

A. Yes, sir.

Q. And then you would have a man go on the plank and jump on it?

A. I would, I would jump on it myself too.

Q. And if showed any weak spot, or you were in doubt about it, you would turn it over and jump on the other side of it?

A. I would.

[fol. 102] Q. Could that test be made by leaving one end of the plank on the ground and elevating the other end on some object?

A. Certainly.

Q. Of course, Mr. Heusel, after you tested out a plank in that way, and found it to be all right, it could be moved from one job to another without testing it every time you put it on the job?

A. Naturally enough, if you once test it on every part of it, after you made a test like that.

Q. But before using a plank, you would test it out in that way?

A. Not every time, no, sir, unless you had some very dangerous job, where it was going to go over some height, you doubt it, you make another test.

Q. That was always done where there was any scaffold or plank used over any considerable height?

A. Yes, sir.

Cross-examination by Mr. Brennan:

Q. How old are you, Mr. Heusel?

A. I am going on thirty-seven.

Q. You testified at the last trial of this case, didn't you?

A. I did.

Q. And at that time you happened to be a witness in another case which Mr. Burke was trying?

A. I was.

Q. And you happened to be in his office and they spoke to you about this case?

A. In my experience——

Q. Is that so or isn't it?

A. Yes.

Q. And you volunteered your services as a witness in this case?

A. I did.

Q. And as an expert?

A. As an expert, right.

[fol. 103] Q. And the last trial you were working as a steeplejack?

A. I was.

Q. What are you working at now?

A. I am putting up an aerial on St. Michael's church, 42nd Street and Fourth Avenue.

Q. You are still a steeplejack?

A. I am.

Q. How long have you been a steeplejack?

A. I guess about eight years, in between. That is, you know, I didn't work steady as a steeplejack all the time, you don't get them jobs all the time, but I am still ready for any job.

Q. I noticed, Mr. Heusel, that you were reading from a list of places where you worked?

A. Yes, I did, Mr. Brennan, counselor, to keep a memorandum of all these places.

Q. You needn't make a speech on every answer.

A. But if you give me a half a chance I can explain myself.

The Court: You will get all the chance you want.

Q. When did you make that list?

A. I doped it out coming down in the car

Q. You expected that you were going to be asked about the different places where you worked by Mr. Burke?

A. I did, and it would be a pretty hard thing to get them all down.

Q. I asked you about it at the last trial, didn't I?

A. You did.

Q. About the different places?

A. You did.

Q. I asked you what your business was in the Olson Iron Works?

A. You did.

Q. What did you tell us?

A. I told you I was a rigger mostly all the time.

[fol. 104] Q. Didn't you tell us you were employed there and paid there as a boilermaker?

A. Employed and paid as a boilermaker by doing rigger's work.

Q. Is your trade that of a boilermaker?

A. I can do boilermaker's work, too, and did.
Q. Did you learn the trade of boilermaker?
A. I worked all the time from about eleven years old.
Q. Did you learn the trade of boilermaker?
A. I did.
Q. At what age did you start as a boilermaker, not as an apprentice but as a boilermaker?
A. As a boilermaker I guess about—I can't very well recall this because——
Q. Give us as nearly as you can?
A. I can't recall it because I worked around shipyards all my life.
Q. You can't recall it?
A. I can't recall it.
Q. In how many shipyards did you work as a boilermaker?
A. Well, I was always ready, that is the biggest part of the money is on the boilermaker's side, but I was put rigging all the time.

Mr. Brennan: I move to strike out, "I was rigging all the time."
The Court: Yes.

Q. Then you went to work in each place where you were employed as a boilermaker, am I right about that, and you were paid as a boilermaker, is that right?
A. I was paid as a boilermaker.
Q. How much did a boilermaker get in 1920?
A. At that time $6.20.
Q. How much did a rigger get?
A. Don't ask me, they get all kinds of pay, I don't know what they ever got.
[fol. 105] Q. You were paid as a boilermaker?
A. Right.
Q. You say that if a plank were brought to you, which was to bridge over a space of six to eight feet, which was new, which showed no knot holes, which showed no knots in it, which was two inches thick, which was the type of plank ordinarily used for that purpose, in the absence of any indications of defect, or weakness in it, that you would test it, is that right?
A. If it was the first time I was using it I would test it.
Q. You would test it?
A. Yes, your Honor.
Q. You didn't mean to say that was the custom in the different places that you worked, it was just your custom?
A. No, it was customarily used.
Q. Have you seen others doing it?
A. I have.
Q. Have you seen men who procured planks for their own use doing it?
A. Well I did, yes, sir.
Q. Very often?
A. Very often.

Q. That is a man who was going to use a plank to stand on would test it himself?

A. Test it out naturally enough.

Q. New planks?

A. New planks.

Q. Without knots in them?

A. It wouldn't make any difference whether knots were in it, you test them any way.

Q. I understood you to say to the Court and Jury that you would test this plank by putting one end on an elevation and the other end on the ground?

A. Yes, sir.

Q. And if it was a sixteen foot plank you would get in the middle of it and jump up and down on it?

A. Yes, sir.

Q. And if it didn't break you would use it?

A. Naturally enough. If a weak spot showed up it would be different.

[fol. 106] Q. If it didn't break you would use it?

A. Right.

Q. How much do you weigh?

A. 152 to-day.

Q. So if a plank such as has been described to you here were brought to you to be placed over an opening that you heard described here, six to eight foot opening, you would test it in the way that you have described?

A. I would.

Q. And if it didn't break you would put it there and let the men work on it?

A. Right.

Q. No matter how many men or how much they weighed?

A. It would be according——

Q. Will you answer the question. No matter how many men or how much they weighed, is that right?

A. Well, it depends on the job mostly, the job that you are going to do.

Q. You have told us that the test you would make, that you did make——

A. If men were going to walk over it naturally enough, yes, sir.

Q. Did you ever work in the Robins Dry Dock?

A. I did, I worked there about three or four years.

Q. As a boilermaker?

A. As a boss over a gang, rigger's gang.

Q. But you were rated as a boilermaker?

A. No, they never rate you down there, never did.

Q. You were paid as a boilermaker?

A. No, sir, that is why I ain't there today.

Q. Were you paid as a rigger?

A. Paid a holder-on's wages they gave me, a man that holds on rivets, they paid me about his wages at that time.

Q. Did you work as a holder-on?

A. I done that in between, yes, sir.

Q. That is the man who, with some kind of tool, holds on to the rivets while the riveter is working?

A. Yes, sir, while the riveter outside drives the head.

[fol. 107] Q. You did that for the Robbins Dry Dock?

A. I did too.

Q. That is a sort of a riveter's helper, a holder-on?

A. He is classed as a boilermaker, they call them all boilermakers, he is the inside man, and there is an outside gang.

Q. Even though he is assisting the riveter, holder-on for the riveter putting plates on the ship, he is still a boilermaker?

A. That is the rigger's gang that puts the plates on.

Q. Do they call the holder-on a rigger too?

A. They put them on and pulled them off.

Q. A holder-on, who is working on the plates of a ship, the outside plates, is, you say, classed as a boilermaker?

A. He is.

Q. No matter what kind of work he is doing about the ship, he is classed as a boilermaker?

A. No, not if he is with the machinists, he is classed with the machinists' gang.

Q. You say that a rigger is classed as a boiler-maker, and a riveter is classed as a boilermaker, and a holder-on is classed as a boilermaker?

A. A holder-on, a passer, one that makes up the gang, is classed as a boilermaker gang.

Q. During the years you were employed in the Robbins Dry Dock, you say that you saw other riggers making this test that you have just described?

A. I did, and I could mention their names if it is necessary.

Q. Name them?

A. Wal Stacy, Billy Marino.

Q. How do you spell that?

A. I don't know how you spell it.

Q. Marino?

A. Marine, yes, sir. He has got another brother down there, Dominick Marino, Big Dominick, you know him.

[fol. 108] Q. Dominick Marino. Did you ever see Dominick Marino jump on a new plank?

A. I never seen him, no.

Q. Did you ever see Stacy jump on a new plank?

A. I did.

Q. On a new one?

A. I did.

Q. How often?

A. Every time he was going to use it in a dangerous job, or any one he thinks will need a test, he would give it to her. It would be different if he was laying it on a tank top, you wouldn't need

to jump on it, he could tell by the look of the plank whether it would be all right to walk on.

Q. Take a space six or eight feet in width, which is to be bridged over by a new plank two inches in thickness and about eight to ten inches in width, and assume that the plank is about ten feet long, what test would you make of such a plank, if any, if it were brought to you to bridge over that space?

A. The same method as I told you before, jump on it.

Q. Suppose the plank were six feet long to bridge a three foot space, would you make a test of it?

A. If she was going over any height I would.

Q. What test would you make of that?

A. Jump on it.

Q. Six feet long?

A. Yes, if she was going over a space of three feet.

Q. And if that plank two inches thick withstood your weight, then you would use it?

A. Yes, sir.

Q. And the same thing would apply if the plank were thirty feet long?

A. Yes, sir.

Q. You would make the same test?

A. Yes, sir.

Q. Or if the plank were four feet long, you would make the same test?

A. I would.

[fol. 109] Q. Didn't you testify at the last trial here, in answer to the same question, if the plank were six feet long you wouldn't make any test?

A. It is according to where you are going to use this plank, if it is going over any height.

Q. I didn't ask you that. Didn't you testify at the last trial, if you were going to use a six foot plank, two inches thick, you wouldn't make any test of it?

A. I think I did, but it is all——

Q. Have you changed your mind since the last trial?

A. Not at all.

Q. Were you discharged from the Robbins Dry Dock?

A. I quit.

Q. Were you requested to quit?

A. No, sir, I was not.

Q. Suppose, Mr. Heusel, that while you were jumping on this plank it broke, and your leg was broken at the same time?

A. What do you mean, when I am making the test?

Q. Yes?

A. I am not testing this plank in the air, I am testing it on something safe.

Q. Suppose it suddenly broke and your leg broke, and you fell down and broke your leg, would you sue the Company?

A. I don't think I would.

Mr. Burke: Objected to.
The Court: Objection sustained.

Redirect examination by Mr. Burke:

Q. During the time that you worked in the Robbins Dry Dock, you had a gang of men working under you?
A. I did.
Q. When the plank was to be tested would the different men of the gang bring the plank to you?
[fol. 110] A. They would bring it to the job where I was going on.
Q. Would it be tested under your direction?
A. I tested it.

Mr. Brennan: I move to strike out the testimony of this witness on the ground that the testimony fails to establish, under the rules of evidence, a custom.
The Court: Motion denied.
Mr. Brennan: Exception.

Fannie Dahl, being duly sworn, testified as follows:

Direct examination by Mr. Burke:

Q. Mrs. Dahl, where do you live?
A. 68 Third Street, Brooklyn.
Q. You are the wife of the plaintiff?
A. Yes, sir.
Q. When did you first see him after he met with his injury that he described?
A. Holy Family Hospital.
Q. What was his condition when you saw him in the Holy Family Hospital?
A. He was all covered in bed.
Q. Did you see him from time to time when he was in the hospital before he came home?
A. Yes, sir.
Q. And then after he came home was it you that took care of him?
A. Yes.
Q. And the children helped?
A. Yes.

[fol. 111] Mr. Brennan: Objected to.
The Court: Objection sustained.

Q. What have you seen your husband doing since the time that he met with this injury, what does he do that you see?
A. In around the house?
Q. Sitting down?
A. Sitting down.

Q. Or moving about the house most of the time?
A. Yes, sir, in the armchair, he sits around in the armchair.
Q. Has he ever done any work that you know of since the time of this injury?
A. No, he don't do any work, because I am out then he do a little around the house.
Q. Do you yourself do anything for him such as rub liniments or anything of that sort?
A. Yes, sir.
Q. You have continued to do that down to the present time, or when did you do it last?
A. Yes, sir, all the time, because he is always complaining of pain.

No cross examination.

BERTHA DAHL, being duly sworn, testified as follows:

Direct examination by Mr. Burke:

Q. Where do you live?
A. 68 Third Street, Brooklyn.
Q. Do you remember the time that your father met with this injury, Bertha?
A. Yes, sir.
[fol. 112] Q. Do you remember when he came home from the hospital?
A. Yes, sir.
Q. What did you see him doing around the house after he came home from the hospital?
A. Sitting around.
Q. Was there any particular chair that he sat in all the time?
A. Yes, sir, he had an armchair especially for himself.
Q. What did you notice when he sat in the chair, or got up out of the chair?
A. When he sat down on the chair he put both arms on the chair and raised himself up the same way.
Q. State whether or not he has continued to do that down to the present time?
A. Yes, sir, he still does it.
Q. What business are you engaged in?
A. I am now a packer for the New York Telephone Company.
Q. Were you going to school at the time your father met with this accident?

Mr. Brennan: Objected to as incompetent, immaterial and irrelevant.
The Court: Objection sustained.

Cross-examination by Mr. Brennan:

Q. You don't know whether your father goes out and takes a walk during the day, do you?
A. I don't think he is very able to do that.
Q. You don't know whether he does or not?
A. No.

Mr. Burke: Plaintiff rests.

[fol. 113] Mr. Brennan: I move to dismiss the complaint, if the Court please, on the ground that the plaintiff has failed to establish a cause of action in that he has failed to show any negligence on the part of this defendant, and has failed to show his own freedom from contributory neglige-ce.

The Court: Denied.

Mr. Brennan: Exception. May I ask at this time if it is the intention of the Court to apply Section 18 of the Labor Law to this case?

The Court: I am forced to.

Mr. Brennan: Then I would like at this time, if the Court please, to put an exception on the record with regard to that for the reason that I assume that, if the section were not applied, the motion at this time would very likely be granted, therefore I would like to put my exception on the record at this time to your Honor's statement.

I except to the application of Section 18 of the Labor Law of the State of New York on the ground that said section modifies and changes the fundamental admiralty law by imposing additional duties on the defendant, and depriving it of its defenses, and changes the rights and duties of the parties, thus destroying the uniformity of the admiralty law as contemplated in Article 3, Sections 24 and 256 of the United States Judicial Code, inasmuch as the plaintiff is only in this Court by virtue of the jurisdiction conferred upon him by Sections 24 & 256 of the United States Judicial [fol. 114] Code, and his rights must be measured by the admiralty and maritime laws, and therefore the application of Section 18 of the Labor Law of the State of New York is unconstitutional.

Thomas Kilbride, being duly sworn, testified as follows:

Direct examination by Mr. Brennan:

Q. Where do you live?
A. 388 Nineteenth Street, Brooklyn.
Q. Mr. Kilbride, what was your business in February, 1920?
A. I was foreman over the riggers, over the machinists' helpers down in the Robins Dry Dock.

Q. Were you in charge of the gang on the ship El Occident at the time that Mr. Dahl was injured?

A. I was in charge over the helpers under Burgess as the boss machinist, I was over the machinists' helpers.

Q. You were over the gang that were doing this work at the place where Dahl was injured?

A. Yes, sir.

Q. You are not now connected with the Robins Dry Dock?

A. No, sir.

Q. What business are you in now?

A. In the building line.

Q. How long, altogether had you been employed by Robins Dry Dock?

A. Twelve years.

Q. On the morning of this accident, will you just describe to the Court and jury what you had done just before this accident?

[fol. 115] A. Well, we took various pieces of machinery up to the shop, and when we came back one of the planks was taken away from the place, and when I came back I directed the men to get another plank for to put down where this plank was taken away.

Q. Did you direct them to go any particular place to get it?

A. No, sir, I did not.

Q. What did you say to them?

A. I told them to get a plank and put it down where this one had been taken away.

Q. In response to that did the men bring any planks to you?

A. They brought back two planks but they were too short.

Q. That is they were too short to bridge over the space that you wanted to bridge over?

A. Yes, sir.

Q. Where was that place?

A. The grating that was taken up was about ten feet in length.

Q. What was the space between the supports of this plank?

A. The space was about six and a half to seven feet, or maybe a little more.

Q. Would you say somewheres between six and eight feet?

A. Something like that.

Q. That was the space that had to be covered by this plank?

A. Yes, sir.

Q. They did bring a plank to you?

A. Yes, sir.

Q. Did you examine that plank?

A. Yes, I looked it over, it looked all right to me.

Q. Just describe to the Court and Jury, as nearly as you can, its length, thickness and general appearance?

A. It was around fourteen or fifteen feet long, it was two inches thick, nine inches wide, and it looked all right to me, only there was a fault in the plank on the inside and I didn't see that, the out-

[fol. 116] side of the plank looked all right but the fault was in the middle of the plank.

The Court: You couldn't see it by looking at it?
The Witness: No, your Honor.
The Court: There was no way you could see it by using ordinary methods?
The Witness: No, your Honor, I couldn't see it.
The Court: You could test it though?
The Witness: If I had any doubt on it I would have tested it, but it looked all right.

Q. We will come to the knot in a moment, I am asking you as to the appearance of the plank when it was first brought to you by Dahl and Kenny, when you looked at it then could you see whether it looked to be a new plank?
A. It was a new plank.
Q. Was there any indication of a knot or defect in it as you looked at it then before it broke?
A. Not as I could see at the present time.

The Court: One of the witnesses said that on one end of the plank there was a knot apparent?
The Witness: I didn't see that.
The Court: About half an inch or an inch from the edge of the plank, and it was an inch to an inch and a half in diameter. Did you observe such a knot?
The Witness: No, your Honor, I did not.
The Court: Did you look at it carefully?
[fol. 117] The Witness: I did, I looked at it fairly good as they were putting it down.
The Court: You knew what it was going to be used for?
The Witness: Yes, sir.
The Court: And you knew it was going to bridge quite a height?
The Witness: Yes, sir.
The Court: You knew below that bridge was the bottom of the hold?
The Witness: Yes, sir.
The Court: And if anybody fell he would fall to the bottom of the hold.
The Witness: Yes sir.
The Court: And you had that in mind when you examined the plank?
The Witness: Yes your Honor.

Q. And you also knew that you yourself were going to stand on it yourself, and as a matter of fact you were the first one who stood on it?
A. I was the first one.
Q. When this plank was brought to you who brought it?
A. Mr. Dahl and Mr. Kenny.
Q. What did you do with reference to the plank other than look at it, did you handle it yourself?
A. Yes, sir, I gave it to the man to put it down there.
Q. You helped to lay it across this space?

A. Yes, sir.

Q. Just what happened after that?

A. We had a H. P. piston valve to take in from the between deck and we had two chain falls to handle the valve, we lifted the valve took the one in the between deck and we transferred it to the [fol. 118] one inside in the engine room over those *four planks* that were down there. I was the first man to step in as it went inside on that staging, Mr. Dahl followed me in, and I was going to let go of the rope that I had on for a packer as it came from the between deck, and as I was letting go of the rope it happened Mr. Dahl stood on the same plank as I did, and as soon as he stepped on it it broke and the two of us went down together, but as I was going down this rope was long, extending down to the staging, and I caught the bite of the rope as I was going down and I hung onto the rope, and at the same time I was watching Mr. Dahl fall down in the bottom of the engine room holding the side of the column down below.

Q. You saved yourself by holding onto something?

A. Yes, sir, onto the rope.

Q. Did you go down to where Mr. Dahl was afterwards?

A. No, not then, then other men that were down below helped him up.

Q. Did you see him go up the ladder or come up from the place where he had fallen?

A. I seen the men have a hold of him down below, I don't know exactly whether they took him up, because I was pretty well shook up myself with the check I got from the rope.

Q. After Dahl was taken out did you look at the plank that had broken?

A. Yes, sir.

Q. Will you describe to the Court and Jury just what defect was in that plank, how it showed after the plank had broken?

A. There was a knot, three knots right across the middle of the plank, and the knot extended on a "U" shape, like that, it went [fol. 119] up like that, and in between these three knots the core of the plank was all gone, nothing there at all but the three knots across the plank.

The Court: It was like a shell?

The Witness: Yes, sir.

The Court: And the outer part of the shell is what you could see?

The Witness: Yes, sir.

Q. Supposing this to be the plank, Mr. Kilbride, this being the top side or flat side, here the underside, and these being the edge (illustrating). Did the knot show through on this side, this side, this side or this side (indicating)?

A. No, not as I could see, it didn't show to me.

Q. That is after you examined it, when you examined it after the accident, after it had broken?

A. Yes.

Q. There has been some testimony here, Mr. Kilbride, that it was customary for riggers and foreman riggers to make tests of new planks such as the plank that was brought to you on this day. Have you ever heard of such a custom, or have you ever seen such a thing in the years that you have been employed in the Robins Dry Dock?

A. Not without you have some doubt on a plank, or you think it is going to break, you will test it, but if it is a new plank you will look at it. If it looks bad you will test it, if there is anything in it, bad knots you would test it.

Q. The custom was, if a plank was brought to you by a man which excited your suspicion by reason of knots or other apparent weakness, then you would test it?

A. Yes, sir.

[fol. 120] Q. But if the plank looked new and good, substantial, would you make any test of it?

A. No.

Cross-examination by Mr. Burke:

Q. In your twelve years, or whatever it was, of experience, handling planks, Mr. Kilbride, you had seen a great many knots in them, hadn't you?

A. Yes, sir, off and on.

Q. And you know something about the growth of a tree? These planks are all sawed off—Have you seen trees grow?

A. Yes.

Q. Even if you live in the City all your life you have seen plenty of trees?

A. Yes.

Q. The planks that you used down there for your ship repair work, were sawed on all four sides or edges, were they not?

A. I beg your pardon.

Q. The planks that you used were sawed on all four sides or edges, there was no bark on those planks?

A. No bark.

Q. It was all planed clean wood?

A. Yes, sir.

Q. You know what makes the knot, it is the limb growing out of the tree?

A. Yes.

Q. This plank that broke had no bark on it of any kind, did it?

A. No.

Q. And yet you say there were three knots, three separate and distinct knots concealed within that plank that didn't show at all on the surface?

A. Yes, sir.

Q. Did you ever see any other plank like that, that had knots inside of it that didn't show anywhere on the surface of the plank?

A. Yes.

Q. You did?

A. Yes, sir.

Q. You testified on the last trial that you were a foreman of riggers, is that correct?

[fol. 121] A. Well of the riggers and helpers, they are classed as machinists' helpers there.

Q. What you really did was to go from one job to another, you were foreman of machinists doing the same kind of work as foreman of riggers, doing that kind of work?

A. Yes.

Q. If you saw a plank with a knot in it, and you were in doubt about the strength of that plank, you would have it tested?

A. Yes, sir.

Q. But on this occasion you thought the plank looked all right, you didn't see this knot, and said, "Use it"?

A. Yes, sir.

FREDERICK BURGESS, being duly sworn, testified as follows:

Direct examination by Mr. Brennan:

Q. Where do you live?

A. 926 East 32nd street, Brooklyn.

Q. Mr. Burgess, you are employed by Robins Dry Dock?

A. Yes, sir.

Q. In what capacity?

A. Boss machinist.

Q. Were you in charge of the job which was being done on the El Occident in February, 1920?

A. Yes, sir.

Q. You weren't present when this accident occurred?

A. No.

Q. Do you know where you were when the accident happened?

A. In the machine shop.

Q. Did you go aboard the ship after the accident?

A. Yes, sir.

Q. You didn't see this plank either before it broke or afterwards?

A. I did not.

[fol. 122] Q. How long have you been connected with the Robins Dry Dock?

A. Do you mean actual service?

Q. Yes?

A. About fourteen years.

Q. Have you had experience with other shipbuilding concerns?

A. Yes, sir.

Q. With what others?

A. Not in this country.

Q. In any country?

A. I served my time in the Davenport Navy Yard in England.

Q. In your fourteen years' experience in the Robins Dry Dock have you ever seen tests made of new planks which were apparently sound?

A. Not to my knowledge. It didn't come under my——
Q. You wouldn't have anything to do with that?
A. No, sir.

No cross examination.

THOMAS GORDON, being duly sworn, testified as follows:

Direct examination by Mr. Brennan:

Q. Where do you live?
A. 9022 180th street, Jamaica, L. I.
Q. You are employed by the Robins Dry Dock?
A. Yes, sir.
Q. How long have you worked there?
A. Going on twenty-seven years.
Q. What is your present occupation there?
A. Rigger.
Q. During your twenty-seven years' experience there I suppose that you have filled a great many positions?
A. I have quite some.
[fol. 123] Q. And you have worked as an ordinary machinist's helper?
A. I have.
Q. And as a machinist?
A. No, sir, I never was a machinist, only in the rigging department.
Q. Assume, Mr. Gordon, that there is a space in the between decks of a ship in the engine room from which a grating has been removed, a space about ten feet in width, and that it becomes necessary to cover that space over with a plank, and a plank is brought which is apparently new, which shows no outward indications of weakness, on which there are no visible knots, which plank is placed in position across an opening some six to eight feet in width. Have you in the course of your experience in the Robins Dry Dock, under those circumstances, ever made a test yourself of such a plank, or isn't a test made?

Mr. Burke: Objected to.

A. No, sir, we never make a test of it.

Mr. Burke: Objected to on the ground as incompetent, the witness is not qualified to answer, and secondly it assumes testimony not on the record, the testimony is that there was a knot visible which was in diameter one-and-a-half inches.

The Court: The testimony is both ways. He is justified in putting it his way.

Mr. Brennan: And also the testimony of Mr. Kenny was that the knot which he described was only visible after the break, he didn't see anything before.

Mr. Burke: No.

The Court: Yes, that is his testimony.

[fol. 124] Q. What is your answer to that?

A. I have never made a test of any new planks that looked good to me, excepting I have a doubt about it, then I would test it.

Q. What is customary with reference to the examination and testing of planking which is to be used as a scaffold, what have you done in all of your twenty-seven years down there, and what have you seen done about the yard?

A. I have never tested any new plank except that I have had a doubt about it. If I seen a knot in a plank I would put it one side and use another one, if I couldn't get another one I would try it out, test it before using it.

Q. Then, Mr. Gordon, if a plank were brought to you, such as I have described, that is a new plank which was the same as other planks used for that purpose, which showed no defect of any kind, you would make no test other than an inspection of it with your eyes?

A. Look at it and if the plank looked good I would go to work and use it; I have often done so.

Q. How many times, about Mr. Gordon, have you seen done, and have done it yourself, the very work which has been described here, that is the bridging over of a space of this kind with planks?

A. It is so numerous I couldn't tell you how many times, Counsellor, but I have done it hundreds and hundreds of times, I have been rigging inside and out both.

Cross-examination by Mr. Burke:

Q. Do I understand you to say, assuming that the plank was new, [fol. 125] you saw a knot in it, you would place it to one side and later on test it?

A. Exactly.

Q. But if you had to use that very plank at that time you would test it before you used it?

A. Yes, sir.

Q. And it would be because of the knot on one end that you would have some doubt about its strength?

A. Yes, sir.

THEODORE C. RUSSELL, being duly sworn, testified as follows:

Direct examination by Mr. Brennan:

Q. Where do you live?

A. 267 Ogden Street, Jersey City.

Q. Where are you employed?

A. T. & L., Tietjen & Land Shipyard, Hoboken.

Q. How long have you been employed in that shipyard?

A. Eight years.

Q. What is your occupation there?

A. Rigger.

Q. How long have you been a rigger?
A. Eight years in Tietjen & Lang.
Q. Before you were a rigger what was your occupation?
A. Sailor.
Q. Mr. Russell, there has been some testimony here that it is customary, when a plank is to be placed over an opening six to eight feet in width, some twenty-five or thirty feet in height, if the plank is new, shows no defects, that it is customary to test such a plank by jumping on it. Have you ever seen or heard of such a custom?
A. No, sir.
[fol. 126] Q. What is the real custom with reference to such a plank and such procedure?
A. If we get planks with knots or split or a cross grain, or the plank being warped, we don't use them, we condemn them. A plank must be straight, she may be warped, that she doesn't lay well, straight on an opening, or over staging, over anything, that she will wiggle. We condemn it.
Q. But if a plank is brought to you by the men who are under you for use, and it looks new, and it looks substantial, shows no defect, do you then make any test of it, or do you go right ahead and use it?
A. Use it.

Cross-examination by Mr. Burke:

Q. Based on the extensive experience that you have had, don't you think it would be safer to test a plank that even showed no apparent defects on it?

By Mr. Brennan: Objected to.
The Court: Objection sustained.

Q. If you saw a knot in a plank you would test it, would you?
A. I wouldn't use it, I would condemn it.
Q. Cast it out altogether?
A. Yes, I wouldn't use a plank with a knot in it.

Q. And that would be true even though it were an absolutely new plank that were sent to the yard?
A. Yes, sir, new planks.

Mr. Brennan: Defendant rests.
Mr. Burke: Plaintiff rests.
Mr. Brennan: I renew the motions made at the close of the plaintiff's case.
The Court: Denied.
Mr. Brennan: Exception.

[fol. 127] THE CHARGE OF THE COURT
MAY, J.:

MR. FOREMAN AND GENTLEMEN OF THE JURY: A jury's duty is no easy one, for there are so many things that have a tendency to

disturb and confuse a jury, not only as to the law and the facts, but those human qualities affect and influence everybody. And so a jury must set their faces against allowing anything but proper and reasonable things to influence them in bringing in a verdict. They must guard themselves against those things which have a natural tendency to affect us in our every day walks of life. We sympathize with all who are in distress, and our hearts bleed for those who are in pain and in suffering, but when we are called as jurymen we are we are called as judges to deal between parties in litigation not because of those human qualities and elements that affect us generally, but for the purpose of determining solely the question of whether the plaintiff has proved his case or not. And if he has not, no matter how our sympathies may go out to him, we must decide against him. And no matter how our feelings may be against him, if the facts indicate that he is entitled to a verdict, then render him a fair verdict, a reasonable verdict, under all of the circumstances in the case.

Every case that comes into Court is an important case. It is important to the litigants and it is much more important to the community, that the law shall be upheld. It is the dignity of the law that is offended against. It may be that the individuals themselves may suffer the direct consequences, but it is the dignity of the law [fol. 128] that is offended against if a juryman does not do his full duty upon the facts as he understands the facts to be, and upon the law as the Court charges the law to be. And it is always the duty of a jury to accept the law as the Court lays it down, for if the Court errs in a statement of the law, there is redress to the party who is aggrieved thereby, whereas if the jury come to a conclusion as a result of false or improper deductions, there is no way of determining that fact, and the party who is injured as a result thereof has no redress. And so I warn you now at the beginning to remove from your consideration all of these thoughts of sympathy, of feeling, of bias, and of prejudice for or against the plaintiff, for or against the defendant, but have in mind that there is in this Court today a plaintiff and a defendant, and the plaintiff seeks his rights, and he is entitled to them, and the defendant seeks its rights, and it is entitled to them, and the one who is in the right should prevail.

If you have been successful in this world you are entitled to commendation, you are entitled to favorable consideration. But because you have been fortunate in worldly goods you should not be penalized therefor, and if you have not had that good fortune, if things have not been favorable to you, you should also not be subjected to a penalty because of that misfortune. So it is in dealing between man and man, between the plaintiff and the defendant, upon the evidence, leaving aside these things that tear at our heart strings, leaving aside those prejudices and feelings that we have in our ordinary walks of life. You have a right to permit your feel- [fol. 129] ings of any kind or character to have full sway in your ordinary relationship with men, but you have no right, when you sit in judgment, because you are dealing now with dollars and

cents, to give a man what he is not entitled to, or refuse to give a man what he is entitled to.

It is always an easy matter, after an accident has occurred, to understand how that accident could have been avoided—every accident can be avoided. You and I are committing acts of negligence every day of the week, sometimes frequently during the course of every day. We read of men being run down by automobiles, and some people censure the automobilist and some know that the pedestrian has much to do with this unfortunate situation. The law imposes upon a man the doing of the thing that the average reasonable man would do under similar circumstances, and no more. It never expects a man to do anything 100% perfect, it never expects a man, where machinery is used, that he shall provide the very best machinery. The law says that a man must comport himself in a reasonably careful manner having in mind the general situation. And when he has done that, and some one is injured, then he is not accountable, because he has done all that the law imposes upon him. It is easy to see, after a thing has happened, in the ordinary walks of life, how we could have so conducted ourselves as to have taken the best advantage of the situation so as to have avoided an accident. But in sizing up, as jurymen, the situation, you must have in mind the conditions as they were at the time just immediately before and leading up to and including the accident itself, and you must [fol. 130] gauge and analyze the testimony in the light of the conditions that existed then. We all know that if there was a thought in the minds of any of these men that this plank was a dangerous or weak plank, they would have guarded against it. Everybody knows now, in the light of the fact that Dahl was precipitated from this so-called bridge, or as it is known under the law, a scaffold, down to the bottom of the hold, some twenty-five or thirty feet, and that he met with a serious injury. Everybody regrets it. But we are here to determine whether, as this thing was developing, the conduct of the men, and of the plaintiff and of the defendant, was conduct that was negligent or not, and not in the light of the things that subsequently developed.

The plaintiff brings the action, and having brought the action the law imposes certain burdens upon him. If somebody were suing you, you would expect that that party would prove his case against you, you would not be called upon to prove that you were in the right, that party would be called upon to prove that he was in the right. And that is so in every civil suit, the plaintiff has the burden of proving his case by what we in law call a fair preponderance of the evidence. And that only means that he must prove, by credible testimony, that his story to be the correct story as a result of a proper analysis of the testimony, that there is the inherent ring of truth in his story, that there is quality and reason in his story. And if the evidence is equally balanced, so that the jury are uncertain as to who is the right, and who is in the wrong, the plaintiff cannot recover, and if the evidence favors the defendant, [fol. 131] the plaintiff cannot recover, but if the evidence favors

the plaintiff, then the plaintiff is entitled to a verdict in such sum as I shall hereafter charge you.

In most cases there is a clean cut issue of fact. As was said by one of the counsel, this is an exceptional case, where there is no dispute as to the manner in which the accident happened, the time and place and the results of the accident, except in so far as it affects the physical condition of the plaintiff. There is a dispute there that you will be called upon to decide. While no medical testimony was introduced on the part of the defendant in that regard, you still have what the Doctor said, you have the X-rays, you have the method of treatment, and you have your own experience, and your observation of the plaintiff himself, to aid you in determining the extent to which the plaintiff was injured. There is in this case, if there be any dispute at all, a dispute between the experts as to the course of conduct, in a case of this character, at the time that things are developing as they developed in this case, that you will be called upon to decide. You have seen these men upon the stand, you have watched them carefully. You did it for the purpose of finding out who was telling the truth, to what extent he was telling the truth, whether he deliberately made a misstatement. And you are influenced, as you always are, when you meet people and they tell you things, by appearances, by conduct and by the stories that they tell, and the way they are told, and whether they are reasonable or not. Take into account the interest that a witness has. Every one is interested and influenced by his own personal interest, and the plaintiff is interested in this case because your ver- [fol. 132] dict will affect him directly. And it is the natural thing that a man will testify along lines that are most favorable to himself, not that he means to deliberately lie, not that he does not want to tell the truth, but his own self interest in a large measure prevents his telling the story in a manner that a disinterested witness would tell it. I do not mean by that to say that because this plaintiff is interested that he has made a misstatement, or that he would deliberately commit perjury, any more than if he had no interest that he would tell all of the truth, but that is an element that you may take into account in this case. The only part of his testimony that is in dispute is the extent of the injury that he sustained, and the damage that he suffered as a result of this accident.

Gentlemen, weigh up this case carefully, and after you have done that find out all of the facts, as you understand the facts to be, uninfluenced by outside considerations. You may not inject into this case evidence that is not here. You may take all of the evidence, you may draw all your natural conclusions and inferences from the evidence, you may take all of the circumstances and the physical conditions that surround this case, and then determine what the truth is and render a conscientious verdict.

In all cases of this kind that are brought in the State Court, we proceed, under ordinary circumstances, along certain lines that are imposed upon the plaintiff. He has the burden of proving two things. He must first prove that *that* defendant was negligent. And by "negligence" is meant that the defendant did not conduct

itself in a reasonably prudent and careful manner, such as a reasona-
[fol. 133] bly prudent and careful man would have done under the circumstances. And secondly, that he was free from any negligence that contributed to the injury. In other words he must prove that the injury was the result solely of the negligence of the defendant, and that he himself comported himself in a reasonably prudent manner, having in mind the situation as it developed.

There is going to be considerable confusion in this case because of what I might term the conflict of laws, and I do not feel at all easy in stating to you what the law is, because, as we read the law that pertains to this case, there is confusion in the minds of lawyers, as there is in the minds of judges, and the law is still in a very much unsettled and disturbed condition. But the law is as I give it to you, and you must accept it, and if I am in error with respect to it the aggrieved party will have his remedy as a result. And that confusion grows out of this: This is what we call a maritime tort, an action in negligence that is governed by the maritime laws, the admiralty laws, the laws that pertain to navigable waters in this country. And under ordinary circumstances such cases should be brought in the United States Court. It is difficult enough for a State Court Judge to give the law that is the State law without attempting to give United States law, or the law that applies in United States cases, affected, influenced and modified to some extent by the laws of the State. And so the law permits, even in a maritime case such as should ordinarily be brought in the United States Court, to be tried in a State Court. But the maritime law is applied, and those maritime laws are known by lawyers as the common law. Those are laws that have developed as a result of expe-
[fol. 134] rience, and have been indicated in decisions of many many years ago, and have become the basic law of the land, for the law in the United States is what we call the common law. And under the common law the same rule applies in this case as the rules that I have laid down to you, that the burden is upon the plaintiff to prove that the defendant was negligent, and that he himself was free from any contributory negligence. In this case, however, comes a provision known as Section 18 of the Labor Law, and Section 18 of the Labor Law reads as follows: "A person employing or directing another to perform labor of any kind, in the erection, repairing, altering or painting of a house, building or structure, shall not furnish, or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances, which are unsafe, unsuitable, or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged." And the decisions hold that Section 18 of the Labor Law does not make an employer, as we term him, the "master," in this case the defendant, an insurer of the scaffold—and this plank within the meaning of the law is a scaffold—it does not make the master an insurer of the safety of the scaffold under all conditions, it requires the scaffold to be so safe as to give proper protection to the workmen engaged in their duty. However careful

the master, he is responsible unless the scaffold is in fact a proper one, proper to protect the workman in the performance of his work. No law of the State can modify or affect the rights of workmen who are operating under the maritime law. And it has been held that [fol. 135] this Section 18 of the Labor Law does not modify or affect the law, but may be read in conjunction with the law. And as I understand the law to be, in determining in this case whether the defendant was negligent—for the plaintiff must still prove that the defendant was negligent—you must have in mind that there was in existence in the State a law which imposed upon the defendant the burden and the necessity of providing a scaffold that was proper for the workman to work upon. And in this case, in the light of that law, you must determine whether the defendant knowing the law, as it was called upon to know it, acted negligently, and whether or not the plaintiff has proved, by a fair preponderance of evidence, that it acted negligently. If you find that in view of Section 18 of the Labor Law the defendant did act negligently, then you go to the next proposition. If you find that it did not act negligently, that ends this case, and you must render a verdict in favor of the defendant. Assuming, for the purpose of bringing to your attention all of the law in the case, that you find under these circumstances the defendant was negligent, then you come to the next proposition, was the plaintiff free from negligence that contributed to the injury. If he was free, then he is entitled to a verdict. If he did something that contributed to the injury, then he is not entitled to a verdict.

In this case we have, without dispute, that on the day in question it was found necessary, in the performance of the work, to bridge over this chasm that was somewhere between six-and-a-half to eight feet in width, or maybe a little more, where a grating ordinarily was, to permit at least two workmen to stand thereon, so [fol. 136] that they could carry on the work that was necessary at the time to be done. We have without dispute the fact that the plaintiff was directed, together with a man named Kenny, to procure a plank to make the proper bridge or scaffold, and that they went a distance of thirty-five to forty feet away from the place of the work, and after having brought a couple of planks which proved too short, finally picked up this plank, which was a new plank about fourteen feet in length, some eight or nine inches in width, and two inches in thickness, and that plank was observed at the time when it was picked up by Kenny and by Dahl, it appeared to be all right, and it was handed to the foreman or the chief rigger, Kilbride, who looked it over and said it looked all right, and it is apparent, from the testimony here, that none of the three had observed at that time any outward defect either by way of a knot or otherwise in this plank. And the question comes for you to say now, what was the custom, if there was a custom? And you have on the one hand the witness Heusel, who tells you, for the plaintiff, that it was customary in every case, particularly if the bridging was over some great height, or depth, as you may look at it, to subject such a plank to a test that he described. And you have wit-

nesses on the part of the defendant who tell you to the contrary, that they subjected such a plank to a test under certain conditions, where there was suspicion about the plank, where it did not appear right, where there was some apparent defect, and the testimony, apparently uncontradicted, is that wherever there were knots observable, such a plank was not used. We have also the situation that after this plank broke—and why it is not here we know not, [fol. 137] what became of it we know not, we cannot take it into account except it is not here—you have heard testimony that there was, at least to a great part of the width of this plank, a concealed defect, a hollow, which made this part of the plank something without substance to sustain weight. That is the situation, and there is no dispute about that part of it, that a great part of this so-called hollow—whether there were three knots in the shape that was described here or not, whether it was all hollowed out or not, that a great part of it at least was concealed, and whether there was part of it observable later, as Kenney described—and you heard him testify, and that is a matter for you to say. But the question for you to determine is, in the light of the conceded facts, in the light of the situation with respect to the disputed facts, as you understand them, and the circumstances and everything, whether the defendant was negligent in permitting that plank to be used without a test. And if it was not, if it acted reasonably, that ends the case. If it was negligent, then did the plaintiff fail to do something that a reasonable man should have done under the circumstances, or did he do something that a reasonable man should have not done? Was he called upon to make a test? Was he called upon to do more than he did? If he was, and he was negligent, he cannot recover. If he was not negligent, then he is entitled to a verdict.

Gentlemen, if you come to the point that the plaintiff is entitled to a verdict, then he is entitled to such a sum as in your judgment would be fair compensation for the damage that he sustained as a result of the accident. We have here testimony that may be looked at from different standpoints, as to the extent of the injury that the plaintiff sustained. But the law is that he is en- [fol. 138] titled, if he is entitled at all, to such sum as in your opinion will be fair compensation for all of the injury that he suffered, and the pain that he suffered at the time, and that flowed from the accident to the present time, and that, according to your estimation, will continue to flow in the future, and in addition thereto such sum as he was reasonably called upon to expend in his treatment, and such sum as he lost, or will lose because of inability, if there exists any, to earn wages.

The plaintiff has sued here for $50,000. That does not mean that he is entitled to recover $50,000, it does not mean that he is entitled to recover $1,000, that means that is the limit he can recover under any circumstances. It does not mean that he is entitled to recover any particular part of that amount. You are the sole judges to say, and you are to find out what, having in mind all of the situation, is a fair sum as compensation. We are not here to punish anybody, we are here, if at all, to give the plaintiff proper

compensation for the injury that he sustained, for the damage that flowed from the accident that he met with, and when we have done that we have done our duty.

Gentlemen, as I said before to you, I do not feel at all easy in making this charge because of the conflict of laws, because of the confusion that of necessity exists while the laws are in the process of proper and final interpretation, but I am giving you the law, as I understand the law to be, and you are to accept it. I have no idea with respect to the case, whether the plaintiff is in the right, or whether the defendant is in the right, it is no concern of mine, and you cannot, from what I have said, determine that I have any impression, for I have no impression to convey to you. Do your [fol. 139] duty, and when you have done that, as conscientious men, as sworn jurymen, as judges, then you have done all that anybody can ask of you. Render a verdict according to the facts, as you understand them, without any feelings of any kind, and if the plaintiff is to get a verdict give him a verdict in such sum as you think he is entitled to recover under all the circumstances, and if not render a verdict for the defendant.

Are there any requests to charge?

Mr. Burke: I respectfully except to that part of your Honor's charge in which you say that if the plaintiff is guilty of any contributory negligence he cannot recover in this case. And I ask your Honor to charge that the principle of comparative negligence is applicable to this maritime case.

The Court: I will grant you an exception.

Mr. Burke: I ask your Honor to charge the jury that in an action of this kind the defendant is entitled by law to a physical examination of the plaintiff.

The Court: Yes, under the law the defendant is entitled to a physical examination. We haven't the testimony on behalf of the defendant, there is no evidence here to dispute the stories told by the medical experts for the plaintiff, but, as I said to you before, you are to determine the extent of the injury from all that has been said, and from the circumstances, from the facts that have been developed, the treatment of the man and everything else, from your personal observation of him, you are to say what was the extent of his injury.

Mr. Brennan: In that connection I ask your Honor to charge the jury that it is entirely for the jury to say whether or not it has [fol. 140] been necessary for the plaintiff to remain out of employment for the past three years.

The Court: Gentlemen, you are to determine, and that is the sole proposition, the extent of the injury, the extent of the damages. Of course a man is called upon, if he can work, to secure work, and if he cannot do work of one character to do work of another character. He is not permitted, because he has been injured, to lie idly by and saddle the burden upon the man whom he is suing, he is called upon to conduct himself reasonably, to try and earn

money reasonably. If he can earn it, well and good. If he cannot earn as much as he used to he should take as much as he reasonably can earn. And if he cannot work at all, then he is not called upon to work.

Mr. Brennan: In view of the argument of counsel for the plaintiff in relation to the X-rays which appear to have been taken recently of the plaintiff's ankle and elbow, I ask you Honor to charge the jury that they may consider the failure of the plaintiff to produce Dr. Crane to interpret those X-rays.

The Court: Gentlemen, you may take into consideration all of the evidence that is here, and you may take into consideration the evidence that is not here, if it should have been here.

Mr. Brennan: I ask your Honor to charge the jury that if, upon reasonable inspection, the plank in question was found to be safe, showed no symptoms of defect, decay or knots, that then there was no obligation on the part of the defendant to make a further test of it.

The Court: I refuse to charge other than I have charged.

Mr. Brennan: Exception.

[fol. 141] I ask your Honor to charge the jury that the fact that the witness Heusel testified that it was customary for him to make certain tests of new planks, that testimony in itself does not establish a custom.

The Court: We are not concerned with what a certain individual does; what we are concerned with, when it comes to a question of custom, is as to what is customarily used in the particular trade in that particular neighborhood.

Mr. Brennan: I ask your Honor to charge, as a matter of law, that no custom to test by jumping on or otherwise, of new planks, has been established on behalf of the plaintiff in this case.

The Court: I refuse to so charge. I will leave that as a question of fact for the jury to determine.

Mr. Brennan: Exception.

Mr. Brennan: I except to all of that portion of your Honor's charge in which your Honor applies Section 18 of the Labor Law of the State of New York, and I respectfully except to your Honor's reading of Section 18 of the Labor Law to the jury, on the ground that that section modifies and changes the fundamental admiralty law by imposing additional duties on the defendant, and depriving it of its defenses, and changes the rights and duties of the parties, thus destroying the uniformity of the admiralty law as contemplated in Article 3, Sections 24 and 256 of the United States Judicial Code, inasmuch as the plaintiff is only in this Court by virtue of the jurisdiction conferred upon him by Sections 24 and 256 of the United States Judicial Code, and his rights must be measured by [fol. 142] the admiralty and maritime law, and therefore the application of Section 18 of the Labor Law of the State of New York is unconstitutional.

The jury retires.

Counsel stipulate that sealed verdict may be ordered by the Court, to be opened Monday morning by the Court, in the absence of the jury, with the same force and effect as if the jury were present.

Court adjourned until 10 A. M. Monday.

Monday, April 30th, 1923—10 a. m.

The jury rendered a verdict in favor of the plaintiff for $15,000.

MOTION TO SET ASIDE VERDICT AND ORDER OVERRULING SAME

Mr. Brennan: I move to set aside the verdict and for a new trial on the grounds specified in Section 549 of the Civil Practice Act, and I particularly urge the ground that the verdict is excessive. And I desire to add the further ground that the verdict is improper, in that it deprives the defendant of its constitutional rights, in that it tends to destroy the application of Section 18 of the Labor Law, and tends to destroy the uniformity of the maritime law.

The Court: Motion denied.

Mr. Brennan: Exception.

Thirty days' stay and sixty days to make a case.

[fol. 143] STATE OF NEW YORK,
County of New York, ss:

AFFIDAVIT OF NO OPINION

A. G. Maul, being duly sworn, deposes and says that he is the attorney for the defendant, Robins Dry Dock & Repair Co.; that no opinion was handed down by the trial judge in this case in deciding defendant's motion to set aside the verdict and for a new trial upon the minutes.

A. G. Maul.

Notary's certificate omitted.

[fol. 144] AT A TERM OF THE APPELLATE DIVISION OF THE SUPREME COURT HELD IN AND FOR THE SECOND JUDICIAL DEPARTMENT, AT THE BOROUGH OF BROOKLAND, ON THE 21ST DAY OF DECEMBER, 1923

[Title omitted]

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT

The above-named Robins Dry Dock & Repair Company the defendant in this action having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered

in the office of the Clerk of the County of Kings, the 1st day of May, 1923, and from an order made by said Court denying a motion for a new trial therein, and the said appeal having been submitted by Mr. Thomas J. Brennan of Counsel for the appellant and by Mr. Ralph G. Barclay of Counsel for the respondent, and due deliberation having been had thereon,

It is ordered and adjudged that the judgment and order so appealed from be and the same are hereby unanimously affirmed, and that the respondent recover of the appellant the cost of this appeal.

Enter.

William J. Kelly, Presiding Justice.

[fol. 145] Clerk's certificate to above omitted.

[fol. 146] SUPREME COURT, KINGS COUNTY

[Title omitted]

JUDGMENT ON MANDATE

The above-named defendant, Robins Dry Dock and Repair Company, having appealed to the Appellate Division of the Supreme Court, Second Department, from the judgment of the Supreme Court, entered in the office of the Clerk of the County of Kings, on the 1st day of May, 1923, in favor of the plaintiff and against the defendant for the sum of $15,307.85 and from an order denying the defendant's motion for a new trial and entered in the office of the Clerk of the County of Kings on the 16th day of May, 1923, and the said Appellate Division of the Supreme Court having rendered its decision affirming said judgment and order, with costs to the plaintiff, respondent, and having ordered and adjudged that the judgment and order so appealed from be unanimously affirmed with costs of said appeal to the plaintiff, and a certified copy of the order of said Appellate Division having been duly filed together with the record, in the office of the Clerk of the County of Kings, and said costs having been duly taxed by the Clerk of this Court,

Now, on motion of William V. Burke, attorney for the plaintiff, it is

Ordered, adjudged and decreed that the judgment and order so appealed from be and the same hereby is in all things unanimously affirmed, and it is

Further ordered and adjudged that the plaintiff, Lars Dahl, [fol. 147] recover of the defendant Robins Dry Dock & Repair Company, the sum of Ninety-five 35/100 ($95.35), the costs of said appeal, and that the plaintiff have execution therefor.

Judgment signed and entered this 24th day of December, 1923.

William E. Kelly, Clerk.

Clerk's certificate to above omitted.

[fol. 148] APPELLATE DIVISION, SUPREME COURT, SECOND DEPARTMENT

[Title omitted]

NOTICE OF ARGUMENT

Please to take notice, that the argument on the appeal in the above action, will be brought on the argument before the Justices of this Honorable Court at a regular term thereof, to be held at the Borough Hall, in the Borough of Brooklyn, on the 3rd day of December, 1923, at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

Dated the 23rd day of November, 1923.

Yours, &c., William V. Burke, Attorney for Respondent, 375 Fulton Street, Brooklyn, N. Y.

To A. G. Maul, Esq., Attorney for Appellant, 220 Broadway, New York, N. Y.

Clerk's certificate omitted.

[fol. 149] AT A TERM OF THE APPELLATE DIVISION OF THE SUPREME COURT HELD IN AND FOR THE SECOND JUDICIAL DEPARTMENT, AT THE BOROUGH OF BROOKLAND, ON THE 25TH DAY OF JANUARY, 1924

[Title omitted]

ORDER ON MOTION FOR REARGUMENT AND FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

The above-named Robins Dry Dock and Repair Company, the defendant, having moved this Court for a re-argument of the appeal and for leave to appeal to the Court of Appeals herein and the motion having duly come on to be heard and the papers and briefs of the respective parties in support thereof and in opposition thereto having been filed;

Now on reading and filing the papers upon which said motions are based and the opposing papers, and upon considering the said papers and all the papers upon which the appeal was heard;

On motion of Mr. Ralph G. Barclay, of counsel for the plaintiff, it is

Ordered that the said motions be and the same are hereby denied without costs.

Enter.

William J. Kelly, Presiding Justice.

[fol. 149½] Clerk's certificate omitted.

[fols. 150 & 151] At a Court of Appeals for the State of New York Held at Court of Appeals Hall, in the city of Albany, on the Twenty-sixth Day of February A. D. 1924.

[Title omitted]

Order Denying Motion for Appeal

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A copy.

John Ludden, Deputy Clerk.

Clerk's certificate to above omitted.

[fol. 152] Supreme Court of the United States

[Title omitted]

Petition for Writ of Error

To the Honorable William Howard Taft, Chief Justice of the United States, and to the other Justices of said Honorable Court, and to the Honorable the Supreme Court of the United States:

The petition of Robins Dry Dock & Repair Company, a corporation duly organized and existing under the laws of the State of New York, respectfully shows:

First. That heretofore and on or about the 18th day of August, 1920, an action was commenced in the Supreme Court of the State of New York for the county of Kings by Lars Dahl, plaintiff, against your petitioner, as defendant. The complaint in said action alleged that on or about the 2nd day of February, 1920, while the plaintiff was in the employ of the defendant and working on board the SS. "El Occident," a plank on which plaintiff was walking and standing broke and caused plaintiff to fall into the hold of said vessel, by reason of which accident the plaintiff sustained severe and permanent injuries and claimed damages by reason of the alleged negli-
[fol. 153] gence of the defendant. Upon the trial of the action said complaint was amended to further allege that the injuries sustained by the plaintiff were caused solely by and through the negligence of the defendant, in that the defendant negligently and carelessly failed to furnish the defendant a safe scaffold, as required by the Labor Law of the State of New York. To this amendment, the attorneys for your petitioner duly objected on the ground that Section 18 of the Labor Law was unconstitutional, in that it nullified the

effect of Sections 24 and 256 of the United States Judicial Code and destroyed the uniformity of the Admiralty Law as contemplated by the Constitution of the United States. The amendment was allowed and an exception duly taken.

Second. Your petitioner duly answered said complaint and the issues raised by the pleadings came on for trial, on or about April 26, and 27, 1923, at a Trial Term of the Supreme Court of the State of New York, held in and for the County of Kings.

Third. That at the time of the happening of the accident of the said Lars Dahl, defendant in error herein, there was in full force and effect in the State of New York an act known as the Workmen's Compensation Law, being Chapter 67 of the Consolidated Laws as amended, which said act of the State of New York provided in substance that where an employer had secured the payment of compensation in accordance with said Act, he should thereby become relieved [fol. 154] from all liability for personal injuries or deaths sustained by his employees. The petitioner in error herein had thus complied with the Act, but it appeared that the locus of the happening of the accident to the defendant in error was upon the navigable waters of the United States and that, therefore, under the decisions of this Honorable Court in the cases of Knickerbocker Ice Company vs. Stewart, 253 U. S. 149, and State Industrial Commission vs. Nordenholt, 259 U. S. 263, the said defendant in error did not come within the provisions of said Workmen's Compensation Law of the State of New York, but had his right of action for negligence under the Admiralty Law of the United States and that, by virtue of the saving clauses of Sections 24 and 256 of the Federal Judicial Code, the said defendant in error was given the right to maintain such action in the State court by virtue of the common law remedy thereby afforded.

Fourth. That as a result of the trial of said action in the Supreme Court of the State of New York, held in and for the County of Kings, a final judgment was entered therein in favor of Lars Dahl, defendant in error, and against your petitioner, the plaintiff in error, in the sum of $15,307.85; that the said judgment of the Supreme Court of the said State of New York was on the 21st day of December, 1923, unanimously affirmed by the Appellate Division of the Supreme Court for the Second Department, and on the 18th day of January, 1924, application was made by your petitioner to the said Appellate Division of the Supreme Court for the Second De- [fol. 155] partment for leave to appeal to the Court of Appeals from the said order of the Appellate Division affirming said judgment, which said application was on or about the 25th day of January, 1924, denied.

Fifth. The Constitution and Laws of the State of New York provide, as set forth in Sections 588, 589 and 591 of the Code of Civil Procedure, that appeals to the Court of Appeals in civil actions and proceedings shall be confined in cases of the character of this action, which is not appealable as of right, to cases where the Ap-

pellate Division shall certify that, in its opinion, a question of law is involved which ought to be reviewed by the Court of Appeals, or where, in case of such refusal, an appeal is allowed by the Court of Appeals. The decision of the Appellate Division refusing to allow the appeal to the Court of Appeals was unanimous, and an application was thereupon made by your petitioner to appeal to the said Court of Appeals, which latter application was denied by the said Court of Appeals on or about the 26th day of February, 1924, and, therefore, the judgment of said Appellate Division for the First Department is the final judgment of the highest court of the State of New York to which your petitioner, in accordance with the law and practice of said State, can go.

Sixth. Upon the trial of the action herein, the defendant in error relied upon the theory that he was entitled to recover by reason of the fact that your petitioner failed to furnish a safe scaffold. It appeared that the defendant in error had himself, together with a co-[fol. 156] employee selected the plank which caused the accident to the defendant in error and said defendant in error contended that, by virtue of the provisions of Section 18 of the Labor Law of the State of New York, as construed by the Courts of said State such a plank constituted a scaffold and made the duty of an employer to furnish a safe scaffold under and by virtue of the provisions of said Section 18 of the Labor Law, "absolute" and unequivocal. The said plank having broken, the plaintiff in the action claimed that he was therefore entitled to recover.

Seventh. The petitioner objected to the application of the said Labor Law as a measure of the duty which your petitioner owed to the defendant in error, on the ground that said Section 18 of the Labor Law was unconstitutional, and that to apply *and* said Labor Law in this action was to deny the validity of Sections 24 and 256 of the Federal Judicial Code and to sustain the validity of Section 18 of the Labor Law of the State of New York, which was repugnant to the Constitution of the United States and deprived your petitioner of rights and privileges guaranteed to him under said Sections 24 and 256 of the Federal Judicial Code.

Eighth. Your petitioner, therefore, objected and excepted to the action of the Trial Justice in permitting an amendment of the complaint which imposed upon the petitioner the duties prescribed by the Labor Law of the State of New York, duly excepted to the refusal of the Trial Justice to grant the motion of your petitioner to dismiss the complaint at the end of the plaintiff's case, and to the [fol. 157] application at that time by the Trial Justice of Section 18 of the Labor Law to the facts in this case; duly excepted to the application by the court of said Section 18 of the Labor Law at the end of the whole case and to the court's refusal at that time to dismiss the said complaint; duly excepted to that portion of the court's charge in which the Trial Justice applied said Section 18 of the Labor Law, and duly excepted to the refusal of the Trial Justice to set aside the verdict and grant a new trial on the ground

that Section 18 of the Labor Law tended to destroy the uniformity of the Admiralty Law as contemplated by the Constitution of the United States.

Ninth. That in his charge to the jury, the Honorable Trial Justice stated as follows:

"There is going to be considerable confusion in this case because of what I might term the conflict of laws, and I do not feel at all easy in stating to you what the law is, because, as we read the law that pertains to this case, there is confusion in the minds of lawyers, as there is in the minds of judges, and the law is still in a very much unsettled and disturbed condition. But the law is as I give it to you, and you must accept it, and if I am in error with respect to it the aggrieved party will have his remedy as a result. And that confusion grows out of this; this is what we call a maritime tort, an action in negligence that is governed by the maritime laws, the admiralty laws, the laws that pertain to navigable waters in this country. And under ordinary circumstances such cases should be [fol. 158] brought in the United States Court. It is difficult enough for a State Court Judge to give the law that is the State law without attempting to give United States law, or the law that applies in United States cases, affected, influenced and modified to some extent by the laws of this State. And so the law permits, even in a maritime case such as should ordinarily be brought in the United States Court, to be tried in a State Court. But the maritime law is applied, and those maritime laws are known by lawyers as the common law. Those are laws that have developed as a result of experience, and have been indicated in decisions of many many years ago, and have become the basic law of the land, for the law in the United States is what we call the common law. And under the common law the same rule applies in this case as the rules that I have laid down to you that the burden is upon the plaintiff to prove that the defendant was negligent, and that he himself was free from any contributory negligence. In this case, however, comes a provision known as Section 18 of the Labor Law, and Section 18 of the Labor Law reads as follows: 'A person employing or directing another to perform labor of any kind, in the erection, repairing, altering or painting of a house, building or structure, shall not furnish, or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances, which are unsafe, unsuitable, or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged'. And the decisions hold that Section 18 of the Labor Law does not make an employer, as we term him, the "master", in this case the defendant, an insurer of the scaffold—and this plank within the meaning of the law is a scaffold—it does not make the master an insurer of the safety of the scaffold under all conditions, it requires the scaffold to be so safe as to give proper protection to the [fol. 159] workmen engaged in their duty. *However careful the mas-*

ter, he is responsible unless the scaffold is in fact a proper one, proper to protect the workman in the performance of his work. No law of the State can modify or affect the rights of workmen who are operating under the maritime law. And it has been held that this Section 18 of the Labor Law does not modify or affect the law, but may be read in conjunction with the law. And as I understand the law to be, in determining in this case whether the defendant was negligent—for the plaintiff must still prove that the defendant was negligent—you must have in mind that there was in existence in the State a law which imposed upon the defendant the burden and the necessity of providing a scaffold that was proper for the workman to work upon. And in this case, in the light of that law, you must determine whether the defendant knowing the law, as it was called upon to know it, acted negligently, and whether or not the plaintiff has proved, by a fair preponderance of evidence, that it acted negligently. If you find that in view of Section 18 of the Labor Law the defendant did act negligently, then you go to the next proposition. If you find that it did not act negligently, that ends this case, and you must render a verdict in favor of the defendant. *Assuming, for the purpose of bringing to your attention all of the law in the case, that you find under these circumstances the defendant was negligent, then you come to the next proposition, was the plaintiff free from negligence that contributed to the injury. If he was free, then he is entitled to a verdict.* If he did something that contributed to the injury, then he is not entitled to a verdict." (Underscore by petitioner.)

The foregoing charge, as a charge under the Labor Law of the State of New York, is a correct interpretation of that law, which makes the Master responsible if the scaffold breaks, regardless of how careful the master may have been. This is not the common law, nor is it the rule in admiralty. Under the common law and under the admiralty law, the master is not responsible for the negligent acts of the employee himself, nor for the negligent acts of his fellow servant [fol. 160] in selecting a defective plank. Nor under the admiralty law is a single plank, placed as was the plank in this case, regarded as a scaffold. Consequently by the language above quoted, the court in substance told the jury, that if the plank broke, it therefore proved to be unsafe, and the plaintiff was entitled to a verdict.

Tenth. Your petitioner, therefore, respectfully submits that by reason of the decisions of the trial Justice and the learned Appellate Division, there was drawn in question the validity of a statute of the United States, namely, Sections 24 and 256 of the Federal Judicial Code, and the decision was against its validity; and that there was also drawn in question thereby the validity of a statute exercised under the authority of the State of New York, namely, said Section 18 of the Labor Law of the State of New York, which said Section 18 of the Labor Law of the State of New York is repugnant to the Constitution of the United States and the decision was in favor of its validity, and that by reason of the said decisions of the Trial Justice and the affirmance thereof by the said Appellate Division of the

Supreme Court of the State of New York, there was drawn the question of the construction of the Constitution and of statutes of the United States and the decision was against the rights and privileges claimed by your petitioner thereunder, as follows:

I. The Trial Justice denied the validity of Sections 24 and 256 of the Federal Judicial Code which vested in the Federal Courts [fol. 161] "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it," as construed by the United States Supreme Court in the cases of

Chelentis vs. Luckenback Steamship Company, Inc., 247 U. S. 372;

Scheude vs. Zenith Steamship Company, 244 U. S. 646 (affirming 216 Fed. Reporter, 566);

Knickerbocker Ice Company vs. Stewart, 253 U. S. 149;

State Industrial Commission vs. Nordenholt Corporation, 259 U. S. 263;

Southern Pacific Company vs. Jensen, 244 U. S. 205;

Western Fuel Company vs. Garcia, 257 U. S. 233;

Grant-Smith Porter Ship Company vs. Rhode, 257 U. S. 469;

II. The learned trial Justice decided in favor of the validity of Section 18 of the Labor Law of the State of New York, by applying said Section 18 of the Labor Law of the State of New York in this admiralty action, which was being tried in said State court only by virtue of said Sections 24 and 256 of the Federal Judicial Code, whereas, said Section 18 of the Labor Law of the State of New York is unconstitutional in that it destroys the uniformity contemplated by Article 3, Section 2 of the Constitution of the United States.

III. The learned trial Justice denied to the petitioner the right [fol. 162] and privilege claimed by it under the said Sections 24 and 256 of the Federal Judicial Code to have its rights and obligations determined in accordance with the admiralty law, but on the contrary applied Section 18 of the Labor Law of the State of New York as a measure of petitioner's rights and duties.

That your petitioner fully and specifically raised all three questions in the said trial Court by exceptions duly taken, as will more fully appear in the Assignments of Error which are filed herewith.

IV. The Appellate Division erred in refusing to reverse the judgment of the trial Court on the ground that the trial Justice committed reversable error in charging the jury that

"In this case, however, comes a provision known as Section 18 of the Labor Law, and Section 18 of the Labor Law reads as follows: 'A person employing or directing another to perform labor of any kind, in the erection, repairing, altering or painting of a house, building or structure, shall not furnish or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances, which are unsafe, unsuitable, or improper, and which are not so constructed, placed and

operated as to give proper protection to the life and limb of a person so employed or engaged.' * * * However careful the master he is responsible unless the scaffold is in fact a proper one, proper to protect the workman in the performance of his work"

for the reason that said Section 18 of the Labor Law is repugnant to Article 3, Section 2 of the Constitution of the United States in that it destroys the uniformity of the Admiralty Law contemplated by the Constitution and is therefore unconstitutional.

[fol. 163] Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this case to the Supreme Court of New York for the County of Kings, for the correction of errors so complained of, and that the transcript of the record, seals and papers in this case, duly authenticated by the Clerk of said court, may be sent to the Supreme Court of the United States, as provided by law.

Dated this 28th day of Feby., 1924.

A. G. Maul, Attorney for Petitioner and Plaintiff in error, 100 Broadway, Borough of Manhattan, New York City.

[fol. 164] [File endorsement omitted.]

[fol. 165] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR

And now comes Robins Dry Dock & Repair Company, petitioner and plaintiff in error, and in connection with *with* its petition for writ of error shows that in the record and proceedings herein, and in the rendering of the judment and decision of the Supreme Court of the State of New York, entered with the Clerk of Kings County on the first day of May, 1923, manifest error has intervened to the prejudice of this petitioner and plaintiff in error, to wit:

First

The learned Trial Justice erred in permitting an amendment of the complaint upon the trial of this action to include an allegation which permitted the duty of the plaintiff in error to the defendant in error to be measured by the Labor Law of the State of New York, thus destroying the uniformity contemplated by Article 3, Section 2 of the Constitution of the United States, and thus denying the validity of Sections 24 and 256 of the Federal Judicial Code, for the [fol. 166] reason that said Labor Law of the State of New York is repugnant to both the Constitution and said Sections 24 and 256 of the Federal Judicial Code, whereas the court should have denied the motion of the defendant in error to amend the complaint, for the reason that the duties of the plaintiff in error to the defendant in

error should have been measured in accordance with the maritime law.

Second

The Appellate Division of the Supreme Court of the State of New York for the Second Department erred in refusing to reverse the said judgment for the same reason.

Third

The Trial Justice erred in refusing to dismiss the complaint at the end of the plaintiff's case, for the reason that it then appeared that the defendant in error had himself selected the plank which broke and caused his accident and injuries but, instead of so dismissing the complaint, the Trial Justice applied Section 18 of the Labor Law of the State of New York as a measure of the rights and duties of the parties to the action, which said Section 18 of the Labor Law of the State of New York placed upon the employer the absolute duty of furnishing a safe scaffold; whereas, the rights and duties of the parties to this action should have been determined in accordance with the Admiralty Law of the United States, as contemplated by the Constitution of the United States and the statutes enacted by virtue thereof.

[fol. 167]

Fourth

The Appellate Division of the Supreme Court of the State of New York for the Second Department erred in affirming the said judgment for the same reason.

Fifth

The Trial Justice erred in denying the motion of the plaintiff in error made at the close of the whole case for the same reasons as stated in the Third assignment of error.

Sixth

The said Appellate Division erred in refusing to direct a dismissal of the complaint in the action below for the same reasons as stated in the Third assignment of error.

Seventh

That the Trial Justice erred in charging the jury as follows:

"There is going to be considerable confusion in this case because of what I might term the conflict of laws, and I do not feel at all easy in stating to you what the law is, because, as we read the law that pertains to this case, there is confusion in the minds of lawyers, as there is in the minds of judges, and the law is still in a very much unsettled and disturbed condition. But the law is as I give it to you, and you must accept it, and if I am in error with respect to it the

aggrieved party will have his remedy as a result. And that confusion grows out of this: This is what we call a maritime tort, an action in negligence that is governed by the maritime laws, the admiralty laws, the laws that pertain to navigable waters in this country. And under ordinary circumstances such cases should be brought in the United States Court. It is difficult enough for a State Court Judge to give the law that is the State law without attempting to give United States law, or the law that applies in United States cases, affected, influenced and modified to some extent [fol. 168] by the laws of this State. And so the law permits, even in a maritime case such as should ordinarily be brought in the United States Court, to be tried in a State Court. But the maritime law is applied, and those maritime laws are known by lawyers as the common law. Those are laws that have developed as a result of experience, and have been indicated in decisions of many many years ago, and have become the basic law of the land, for the law in the United States is what we call the common law. And under the common law the same rule applies in this case as the rules that I have laid down to you that the burden is upon the plaintiff to prove that the defendant was negligent, and that he himself was free from any contributory negligence. In this case, however, comes a provision known as Section 18 of the Labor Law, and Section 18 of the Labor Law reads as follows: 'A person employing or directing another to perform labor of any kind, in the erection, repairing, altering or painting of a house, building or structure, shall not furnish, or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances, which are unsafe, unsuitable, or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged.' And the decisions hold that Section 18 of the Labor Law does not make an employer, as we term him, the 'master' in this case the defendant, an insurer of the scaffold—and this plank within the meaning of the law is a scaffold—it does not make the master an insurer of the safety of the scaffold under all conditions, it requires the scaffold to be so safe as to give proper protection to the workmen engaged in their duty. However careful the master, he is responsible unless the scaffold is in fact a proper one, proper to protect the workman in the performance of his work. No law of the State can modify or affect the rights of workmen who are operating under the maritime law. And it has been held that this Section 18 of [fol. 169] the Labor Law does not modify or affect the law, but may be read in conjunction with the law. And as I understand the law to be, in determining in this case whether the defendant was negligent—for the plaintiff must still prove that the defendant was negligent—you must have in mind that there was in existence in the State a law which imposed upon the defendant the burden and the necessity of providing a scaffold that was proper for the workman to work upon. And in this case, in the light of that law, you must determine whether the defendant knowing the law, as it was called upon to know it, acted negligently, and whether or not

the plaintiff has proved, by a fair preponderance of evidence, that it acted negligently. If you find that in view of Section 18 of the Labor Law the defendant did act negligently, then you go to the next proposition. If you find that it did not act negligently, that ends this case, and you must render a verdict in favor of the defendant. Assuming, for the purpose of bringing to your attention all of the law in the case, that you find under these circumstances the defendant was negligent, then you come to the next proposition, was the plaintiff free from negligence that contributed to the injury. If he was free, then he is entitled to a verdict. If he did something that contributed to the injury, then he is not entitled to a verdict."

To this portion of the charge to the jury, the defendant duly excepted in the following language:

"I except to all of that portion of your Honor's charge in which your Honor applies Section 18 of the Labor Law of the State of New York, and I respectfully except to your Honor's reading of Section 18 of the Labor Law to the jury, on the ground that that section modifies and changes the fundamental admiralty law by imposing additional duties on the defendant, and depriving it of its defenses, and changes [fol. 170] the rights and duties of the parties, thus destroying the uniformity of the admiralty law as contemplated in Article 3, Sections 24 and 256 of the United States Judicial Code, inasmuch as the plaintiff is only in this Court by virtue of the jurisdiction conferred upon him by Sections 24 and 256 of the United States Judicial Code, and his rights must be measured by the admiralty and maritime law, and therefore the application of Section 18 of the Labor Law of the State of New York is unconstitutional."

Such charge of the trial Justice upholds the validity of Section 18 of the Labor Law of the State of New York, although said Section 18 of the Labor Law is repugnant to Article 3, Section 2 of the Constitution of the United States and repugnant to said Sections 24 and 256 of the Federal Judicial Code.

Eighth

Said Appellate Division erred in affirming the judgment of said Supreme Court of the State of New York, for the reason that the language of the charge of the trial Court set forth in the Seventh assignment of error affected the merits of the controversy and denied to the plaintiff in error the rights and privileges granted to it in said Sections 24 and 256 of the Federal Judicial Code to have the cause of action tried in accordance with the admiralty law.

Ninth

The trial Justice erred in refusing to set aside the verdict of the jury and to grant a new trial, for the reason that the plaintiff in [fol. 171] error was deprived by said verdict and judgment of his right and privilege of having the said action tried in accordance

with the admiralty Law of the United States, and that by so ruling the trial Justice upheld the validity of Section 18 of the Labor Law of the State of New York, which was repugnant to the Constitution of the United States, and denied the validity of Sections 24 and 256 of the United States Judicial Code.

Tenth

The Appellate Division erred in refusing to reverse the judgment of the trial Court on the ground that the trial Justice committed reversable error in charging the jury that

"In this case, however, comes a provision known as Section 18 of the Labor Law, and Section 18 of the Labor Law reads as follows: 'A person employing or directing another to perform labor of any kind, in the erection, repairing, altering or painting of a house, building or structure, shall not furnish or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances, which are unsafe, unsuitable, or improper, and which are not so constructed, placed and operated as to give proper protection to the life, and limb of a person so employed or engaged.' * * * However careful the master he is responsible unless the scaffold is in fact a proper one, proper to protect the workman in the performance of his work"

for the reason that said Section 18 of the Labor Law is repugnant to Article 3, Section 2 of the Constitution of the United States in [fol. 172] that it destroys the uniformity of the Admiralty Law contemplated by the Constitution and is therefore unconstitutional.

Eleventh

The trial Justice erred in charging the jury in the language quoted in the Tenth assignment of error, for the reason that said Section 18 of the Labor Law is repugnant to Article 3, Section 2 of the Constitution of the United States in that it destroys the uniformity of the Admiralty Law contemplated by the Constitution, and is, therefore, unconstitutional.

A. G. Maul, Attorney for Plaintiff in Error, 100 Broadway, New York City.

Read on application for writ of error, 29th day of February, 1924.

— —, Associate Justice of the Supreme Court of the United States.

[fol. 173] [File endorsement omitted.]

[fol. 174] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING WRIT OF ERROR AND BOND OF SUPERSEDEAS—Filed March 1, 1924

On reading the petition of Robins Dry Dock & Repair Company, by A. G. Maul, its attorney, for writ of error and the Assignments of Error and upon due consideration of the records of said cause,

It is ordered, that a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of the State of New York, County of Kings, as prayed for in said petition and the said writ of error and Citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with the Law upon condition that the said petitioner and plaintiff in error, Robins Dry Dock & Repair Company, give security in the sum of Twenty thousand dollars ($20,000.00), together with all costs and disbursements, that the said plaintiff in error should prosecute the said writ of error to effect, and if said plaintiff in error fails to make its plea good shall answer to the defendant in error for all costs and damages that may be adjudged or decreed on account of said writ of error,

[fol. 175] And that said plaintiff in error now presenting a bond in the sum of Twenty thousand dollars ($20,000.00) with the American Surety Company of New York as surety, it is ordered that the same be and hereby is duly approved.

In witness whereof, I have hereunto set my hand this 29th day of February, 1924.

Louis D. Brandeis, Associate Justice, Supreme Court of the United States.

[File endorsement omitted.]

[fols. 176 & 177] Copy of writ of error omitted.

[fol. 178] [Supersedeas bond on writ of error for $20,000.00, approved by Mr. Justice Brandeis, omitted.]

Endorsed on cover: File No. 30,180. New York Supreme Court. Term No. 870. Robins Dry Dock & Repair Company, plaintiff in error, vs. Lars Dahl. Filed March 8th, 1924. File No. 30,180.

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No. [redacted]316

Supreme Court of the United States

October Term—1923.

ROBINS DRY DOCK & REPAIR COMPANY,

Petitioner,

against

LARS DAHL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE COUNTY OF KINGS

and

BRIEF IN SUPPORT THEREOF.

A. G. MAUL,
Attorney for Petitioner.

PRESS OF FITZGERALD PAPER, INC., 40 Washington St., New York City.

Supreme Court of the United States

October Term—1923.

ROBINS DRY DOCK & REPAIR COMPANY, Petitioner, against LARS DAHL, Respondent.	No 870.

Sir:

PLEASE TAKE NOTICE that upon the annexed petition of Robins Dry Dock & Repair Company, a certified copy of the transcript of the record of this cause and the petitioner's brief an application will be made to the Supreme Court of the United States at a term of said Court appointed to be held at the Capitol, Washington, D. C., on Monday, the 7th day of April, 1924, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for a writ of certiorari to be directed to the Supreme Court of the State of New York for the County of Kings, to review the judgment entered in the office of the Clerk of said Court on the 24th day of December, 1923, pursuant to the

order of affirmance by the Appellate Division of the Supreme Court of the State of New York, Second Department, dated the 21st day of December, 1923, which judgment affirmed the judgment of the Supreme Court of the State of New York for the County of Kings entered in the office of the Clerk of the County of Kings on the 1st day of May, 1923, and for such further relief in the premises as may be just and proper.

Dated, New York, March 18, 1924.

Yours, etc.,

A. G. MAUL,
Attorney for Petitioner,
100 Broadway,
New York, N. Y.

To

WILLIAM V. BURKE, Esq.,
Attorney for Respondent,
375 Fulton Street,
Brooklyn, New York.

SUPREME COURT OF THE UNITED STATES.

October Term—1923.

ROBINS DRY DOCK & REPAIR COMPANY,
Petitioner,
against
LARS DAHL,
Respondent.
No 870.

Petition for Writ of Certiorari to the Supreme Court of the State of New York, Kings County.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Robins Dry Dock and Repair Company, in support of its petition for a writ of certiorari to be directed to the Supreme Court of the State of New York for the County of Kings, to review the judgment entered in the office of the Clerk of the Supreme Court of the State of New York for the County of Kings, on the 24th day of December, 1923, in favor of the respondent and against the petitioner, pursuant to the order of affirmance of the Appellate Division of said Court for the Second Department, dated December 21, 1923, which judgment affirmed the judgment of the Supreme Court of the State of New York for the County of Kings, dated the 1st day of May, 1923, in favor of the Re-

spondent and against the Petitioner, for the sum of Fifteen thousand three hundred seven and 85/100 Dollars ($15,307.85), respectfully shows:

FIRST.—That heretofore and on or about the 18th day of August, 1920, an action was commenced in the Supreme Court of the State of New York for the County of Kings, by Lars Dahl, plaintiff, against your petitioner, as defendant. The complaint in said action alleged that on or about the 2nd day of February, 1920, while the plaintiff was in the employ of the defendant and working on board the SS. "El Occident", a plank on which plaintiff was walking and standing broke and caused plaintiff to fall into the hold of said vessel, by reason of which accident the plaintiff sustained severe and permanent injuries and claimed damages by reason of the alleged negligence of the defendant.

SECOND.—Your petitioner duly answered said complaint and the issues raised on the pleadings came on for trial originally on the 24th and 25th days of April, 1922, as a result of which trial a verdict was rendered by the jury in favor of the plaintiff for the sum of $17,500. Judgment was duly entered thereon and an appeal taken by the defendant below to the Appellate Division of the Supreme Court for the Second Department, and the judgment thus entered was reversed and a new trial ordered in an opinion by said Appellate Division reported in 203 Appellate Division (N. Y.), at page 792.

THIRD.—A new trial was had in accordance with said judgment of the Appellate Division for the

Second Department on the 26th and 27th days of April, 1923, and it is as a result of the verdict and judgment entered thereon, and the judgment of affirmance of the Appellate Division for the Second Department, after an appeal taken, that your petitioner is now making this application for a writ of certiorari.

FOURTH.—Upon the trial of the action said complaint was amended to further allege that the injuries sustained by the plaintiff were caused solely by and through the negligence of the defendant in that the defendant negligently and carelessly failed to furnish the plaintiff a safe scaffold, as required by the Labor Law of the State of New York. To this amendment the attorneys for your petitioner duly objected on the ground that Section 18 of the Labor Law was unconstitutional, in that it nullified the effect of Sections 24 and 256 of the United States Judicial Code and destroyed the uniformity of the Admiralty Law as contemplated by the Constitution of the United States. The amendment was allowed and an exception duly taken in the following proceedings:

"Mr. Burke: I move to amend Paragraph 3 of the complaint herein to read as follows:

Third:

'That on or about the 2nd day of February, 1920, while plaintiff was in the employ of the defendant working on the said steamship "El Occident", a plank scaffold on which plaintiff was walking and standing while in the performance of his work as a servant of

the defendant broke and caused plaintiff to fall into the hold of said vessel.'

Fifth:

'That the aforesaid injuries to the plaintiff were caused solely by and through the negligence of the defendant in that the defendant negligently and carelessly, failed to furnish plaintiff with a safe scaffold, and a safe place to work, and safe ways and works on or in which to work, and negligently and carelessly furnished plaintiff and its other workmen an unsafe, inadequate and unsuitable scaffold and plank on which to work, which scaffold and plank were not of sufficient thickness or strength for the purpose for which they were provided by defendant, and were made of wood having a short grain, and which contained a knot or knots which diminished the strength of said scaffold and plank, and defendant failed to inspect or test said scaffold, and plank and scaffold, and unsafe place to work, and failed to furnish plaintiff with a safe scaffold as required by the Labor Law of the State of New York.'

"Mr. Brennan: I object to the amendment on the ground that it is plainly an amendment intended to conform with the opinion of the Appellate Division in this case. And I object on the further ground that it is an attempt to apply Section 18 of the Labor Law of the State of New York to this issue, and the application of Section 18 of the Labor Law is unconstitutional in that it modifies and changes the fun-

damental admiralty law by imposing additional duties on the defendant, depriving it of its defenses and changes the rights and duties of the parties, thus destroying the uniformity of the admiralty law as contemplated in Article 3, Sections 24 and 256 of the United States Judicial Code; in short, that it is unconstitutional.

The Court: I will allow the amendment on the ground that it is made to conform with the opinion of the Appellate Division. So long as the decision in the Wilkes case remains the law I am bound by it no matter whether it conforms to my ideas of the law or not. It is unfortunate that that case has not yet been finally determined, and this case is merely following in the footsteps of the Wilkes case.

By Mr. Brennan: Exception."

FIFTH.—That at the time of the happening of the accident to the said Lars Dahl, respondent herein, there was in full force and effect in the State of New York an Act known as the Workmen's Compensation Law, being Chapter 67 of the Consolidated Laws as amended, which said Act of the State of New York provided in substance that where an employer had secured the payment of compensation in accordance with said Act, he should thereby become relieved from all liability for personal injuries or deaths sustained by his employees. The petitioner herein had thus complied with the Act, but the locus of the happening of the accident to the respondent having been upon the navigable waters of the United States, under the decisions of this Honorable Court in the cases

of *Knickerbocker Ice Company* vs. *Stewart,* 253 U. S., 149, and *State Industrial Commission* vs. *Nordenholt,* 259 U. S., 263, the said respondent did not come within the provisions of said Workmen's Compensation Law of the State of New York, but had his right of action for negligence under the admiralty law of the United States and that, by virtue of the saving clauses of Sections 24 and 256 of the Federal Judicial Code, the said respondent was given the right to maintain such action in the State court by virtue of the common law remedy therein afforded.

SIXTH.—That as a result of the trial of said action in the Supreme Court of the State of New York, held in and for the County of Kings, a final judgment was entered therein in favor of Lars Dahl, respondent, and against your petitioner, in the sum of $15,307.85; that the said judgment of the Supreme Court of the said State of New York was on the 21st day of December, 1923, unanimously affirmed by the Appellate Division of the Supreme Court for the Second Department, by an order of affirmance, upon which order of affirmance a final judgment in favor of respondent was entered in the office of the Clerk of the Supreme Court, Kings County, on the 24th day of December, 1923, and on the 18th day of January, 1924, application was made by your petitioner to the said Appellate Division of the Supreme Court for the Second Department for leave to appeal to the Court of Appeals from the said order of the Appellate Division affirming said judgment, which said application was on or about the 25th day of January, 1924, denied.

SEVENTH.—The Constitution and Laws of the State of New York provide, as set forth in Sections 588, 589 and 591 of the Code of Civil Practice, that appeals to the Court of Appeals in civil actions and proceedings shall be confined to cases of the character of this action, which is not appealable as of right, to cases where the Appellate Division shall certify that, in its opinion, a question of law is involved which ought to be reviewed by the Court of Appeals, or where, in case of such refusal, an appeal is allowed by the Court of Appeals. The decision of the Appellate Division refusing to allow the appeal to the Court of Appeals was unanimous, and an application was thereupon made by your petitioner to the Court of Appeals for leave to appeal to the said Court of Appeals, which latter application was denied by the said Court of Appeals on or about the 26th day of February, 1924, and, therefore, the judgment entered on the order of affirmance of said Appellate Division for the First Department is the final judgment of the highest court of the State of New York to which your petitioner, in accordance with the law and practice of said State, can go.

EIGHTH.—That in accordance with the practice prevailing in the State of New York upon the entry of the judgment of affirmance by said Appellate Division for the Second Department, the records and proceedings in said case were remitted to the Supreme Court of the State of New York for the County of Kings where said record now is.

NINTH.—Upon the trial of the action herein, the respondent relied upon the theory that he was entitled to recover by reason of the fact that your

petitioner failed to furnish a safe scaffold. It appeared that the respondent had himself, together with a co-employee, selected the plank which caused the accident to the respondent and said respondent contended that, by virtue of the provisions of Section 18 of the Labor Law of the State of New York, as construed by the courts of said State, such a plank constituted a scaffold and made the duty of an employer to furnish a safe scaffold under and by virtue of the provisions of said Section 18 of the Labor Law "absolute" and "unequivocal." The said plank having broken, the petitioner in the action claimed that he was therefore entitled to recover.

TENTH.—The petitioner objected to the application of the said Labor Law as a measure of the duty which your petitioner owed to the respondent, on the ground that said Section 18 of the Labor Law was unconstitutional, and that to apply said Labor Law in this action was to deny the validity of Sections 24 and 256 of the Federal Judicial Code and to sustain the validity of Section 18 of the Labor Law of the State of New York, which was repugnant to the Constitution of the United States and deprived your petitioner of rights and privileges guaranteed to him under said Sections 24 and 256 of the Federal Judicial Code.

ELEVENTH.—Your petitioner further objected to the application of Section 18 of the Labor Law to this case at the time of the motion to dismiss the complaint at the end of the plaintiff's case and your petitioner at that time claimed the right to have his obligations and duties measured in accordance with the Admiralty and Maritime Laws, and

contended that said Section 18 of the Labor Law was unconstitutional and deprived it of its defenses as follows:

"Mr. Brennan: I move to dismiss the complaint, if the Court please, on the ground that the plaintiff has failed to establish a cause of action in that he has failed to show any negligence on the part of this defendant, and has failed to show his own freedom from contributory negligence.

The Court: Denied.

Mr. Brennan: Exception. May I ask at this time if it is the intention of the Court to apply Section 18 of the Labor Law to this case?

The Court: I am forced to.

Mr. Brennan: Then I would like at this time, if the Court please, to put an exception on the record with regard to that for the reason that I assume that, if the section were not applied, the motion at this time would very likely be granted, therefore I would like to put my exception on the record at this time to your Honor's statement.

I except to the application of Section 18 of the Labor Law of the State of New York on the ground that said section modifies and changes the fundamental admiralty law by imposing additional duties on the defendant, and depriving it of its defenses, and changes the rights and duties of the parties, thus destroying the uniformity of the Admiralty Law as contemplated in Article 3, Sections 24 and 256 of the United States Judicial Code, inasmuch

as the plaintiff is only in this court by virtue of the jurisdiction conferred upon him by Sections 24 and 256 of the United States Judicial Code, and his rights must be measured by the admiralty and maritime laws, and therefore the application of Section 18 of the Labor Law of the State of New York is unconstitutional."

TWELFTH.—At the end of the whole case your petitioner again renewed the motion to dismiss as made at the close of the plaintiff's case, which said motions were denied and an exception duly taken.

THIRTEENTH.—That in his charge to the jury, the Honorable Trial Justice stated in part as follows:

"There is going to be considerable confusion in this case because of what I might term the conflict of laws, and I do not feel at all easy in stating to you what the law is, because, as we read the law that pertains to this case, there is confusion in the minds of lawyers, as there is in the minds of judges, and the law is still in a very much unsettled and disturbed condition. But the law is as I give it to you, and you must accept it, and if I am in error with respect to it the aggrieved party will have his remedy as a result. And that confusion grows out of this; this is what we call a maritime tort, an action in negligence that is governed by the maritime laws, the admiralty laws, the laws that pertain to navigable waters in this country. And under ordinary circumstances such cases should be brought in the United States Court. It is difficult enough for a State

Court Judge to give the law that is the State law without attempting to give United States law, or the law that applies in United States cases, affected, influenced and modified to some extent by the laws of this State. And so the law permits, even in a maritime case such as should ordinarily be brought in the United States Court, to be tried in a State court. But the maritime law is applied, and those maritime laws are known by lawyers as the common law. Those are laws that have developed as a result of experience, and have been indicated in decisions of many, many years ago, and have become the basic law of the land, for the law in the United States is what we call the common law. And under the common law the same rule applies in this case as the rules that I have laid down to you that the burden is upon the plaintiff to prove that the defendant was negligent, and that he himself was free from any contributory negligence. In this case, however, comes a provision known as Section 18 of the Labor Law, and Section 18 of the Labor Law reads as follows: 'A person employing or directing another to perform labor of any kind, in the erection, repairing, altering or painting of a house, building or structure, shall not furnish, or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances, which are unsafe, unsuitable, or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged.' And the decisions hold that Section 18 of the Labor

Law does not make an employer, as we term him, the 'master', in this case, the defendant, an insurer of the scaffold—and this plank within the meaning of the law is a scaffold—it does not make the master an insurer of the safety of the scaffold under all conditions, it requires the scaffold to be so safe as to give proper protection to the workmen engaged in their duty. *However careful the master, he is responsible unless the scaffold is in fact a proper one, proper to protect the workman in the performance of his work.* No law of the State can modify or affect the rights of workmen who are operating under the maritime law. And it has been held that this Section 18 of the Labor Law does not modify or affect the law, but may be read in conjunction with the law. And as I understand the law to be, in determining in this case whether the defendant was negligent—for the plaintiff must still prove that the defendant was negligent—you must have in mind that there was in existence in the State a law which imposed upon the defendant the burden and the necessity of providing a scaffold that was proper for the workman to work upon. *And in this case, in the light of that law, you must determine whether the defendant knowing the law, as it was called upon to know it, acted negligently,* and whether or not the plaintiff has proved, by a fair preponderance of evidence, that it acted negligently. If you find that in view of Section 18 of the Labor Law the defendant did act negligently, then you go to the next proposition. If you find that it did not act negli-

gently, that ends this case, and you must render a verdict in favor of the defendant. *Assuming, for the purpose of bringing to your attention all of the law in the case, that you find under these circumstances the defendant was negligent, then you come to the next proposition, was the plaintiff free from negligence that contributed to the injury. If he was free, then he is entitled to a verdict.* If he did something that contributed to the injury, then he is not entitled to a verdict." (Italics petitioner's.)

The foregoing charge, as a charge under the Labor Law of the State of New York, is a correct interpretation of that law, as construed by the Court of Appeals of the State of New York, which makes the master responsible if the scaffold breaks, regardless of how careful the master may have been. This is not the common law rule, nor is it the rule in admiralty. Under the common law, and under the admiralty law, the master is not responsible for the negligent acts of the employee himself, nor for the negligent acts of his fellow servant in selecting a defective plank. Nor under the admiralty law is a single plank, placed as was the plank in this case, regarded as a scaffold. Consequently, by the language above quoted, the Court in substance told the jury, that if the plank broke, it therefore proved to be unsafe, and the plaintiff was entitled to a verdict.

To the charge of the Court, as aforesaid, your petitioner duly objected and excepted as follows:

"Mr. Brennan: I except to all of that portion of your Honor's charge in which your

Honor applies Section 18 of the Labor Law of the State of New York, and I respectfully except to your Honor's reading of Section 18 of the Labor Law to the jury, on the ground that that section modifies and changes the fundamental admiralty law by imposing additional duties on the defendant, and depriving it of its defenses, and changes the rights and duties of the parties, thus destroying the uniformity of the admiralty law as contemplated in Article 3, Sections 24 and 256 of the United States Judicial Code, inasmuch as the plaintiff is only in this court by virtue of the jurisdiction conferred upon him by Sections 24 and 256 of the United States Judicial Code, and his rights must be measured by the admiralty and maritime law, and therefore the application of Section 18 of the Labor Law of the State of New York is unconstitutional."

FOURTEENTH.—The jury returned a verdict in favor of the respondent for the sum of $15,000. Your petitioner duly moved to set aside the said verdict and for a new trial, calling the Court's attention to the fact that by said verdict he was deprived of his constitutional rights in that Section 18 of the Labor Law tended to destroy the uniformity of the maritime law as follows:

"Mr. Brennan: I move to set aside the verdict and for a new trial on the grounds specified in Section 549 of the Civil Practice Act, and I particularly urge the ground that the verdict is excessive. And I desire to add the further ground that the verdict is improper, in that it deprives the defendant of its consti-

tutional rights, in that it tends to destroy the application of Section 18 of the Labor Law, and tends to destroy the uniformity of the maritime law."

FIFTEENTH.—Your petitioner respectfully submits that the Court of Appeals of the State of New York having held to the effect that a single plank constitutes a scaffold within the meaning of said Section 18 of the Labor Law of the State of New York, and that no matter how careful the master, he is responsible unless the plank or scaffold is in fact a proper one, that to all practical intents and purposes the application of said Section 18 of the Labor Law of the State of New York in the trial of this admiralty action has resulted in depriving your petitioner of all the defenses to which he was entitled under the admiralty law, as laid down in the decisions of this Honorable Court and the Federal Courts in admiralty, and if the application of labor statutes such as the Labor Law of the State of New York referred to, be permitted, there will result, as was pointed out—to use the language of this Honorable Court in *Workman* vs. *New York City*, 179 U. S., 556—in a situation where—

> "there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port."

The judgment of affirmance of the Appellate Division of the Supreme Court of the State of New

York for the Second Department, therein subverts the fundamental theory of the law, for its result is to permit a state, by its legislative enactment, to entirely change the measure of the rights and obligations which have heretofore been determined in accordance with long-established rules prevailing in the Courts of Admiralty of the United States, and it completely deprives the defendant suitor of the rights and privileges given to him in Sections 24 and 256 of the Federal Judicial Code, of having his case tried in a state court in accordance with the admiralty law. Such a decision is contrary to all of the decisions of this Honorable Court and is contrary to the principle again enunciated in the opinion of this Honorable Court dated February 25, 1924, in the cases of *State of Washington* vs. *Dawson & Co.*, and *Industrial Accident Commission of the State of Colorado* vs. *James Rolph Co.* (Nos. 366 and 684, October Term, 1923), where this Court specifically said that in order to prevent this very error,

> "The Constitution adopted the law of the sea as the measure of maritime rights and obligations. The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course some within the states may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare. The Constitution is supreme."

The Appellate Divisions of the various Departments of the State of New York and the highest

courts of other states of the Union, have arrived at conflicting decisions upon this same subject. The confusion which exists is indicated by the language of the trial Justice, for in his charge he says:

> "There is confusion in the minds of lawyers, as there is in the minds of Judges, and the law is still in a very unsettled and disturbed condition."

SIXTEENTH.—That your petitioner is advised that there are numerous cases pending in the Courts of the State of New York in which the question as to the applicability of the Labor Law in admiralty actions will be decisive. It therefore follows that unless this Honorable Court shall correct the errors of the Court below, your petitioner will be deprived of rights and privileges under Sections 24 and 256 of the Federal Judicial Code.

A writ of error to the Supreme Court of the State of New York for the County of Kings has been granted by this Honorable Court in this cause and is now on the docket of this Court as Number 870, October Term, 1923, and your petitioner is making this application for a writ of certiorari out of abundance of caution for the reason that the question presented is of such importance that the future administration of justice in similar cases would seem to require a decision thereon by this Honorable Court.

WHEREFORE, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Supreme Court of the State of New York for the County of Kings, to certify the case to this Court for review and de-

termination, as provided in the Federal Judicial Code, or that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with said Act.

And your petitioner will ever pray,

ROBINS DRY DOCK & REPAIR COMPANY,
By George J. Robinson,
Vice-President.

A. G. MAUL,
Counsel for Petitioner.

State of New York, }
County of New York, } ss.:

George J. Robinson, being duly sworn, deposes and says that he is Vice-President of Robins Dry Dock & Repair Company, the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof and that the facts therein stated are true to the best of his knowledge, information and belief.

GEORGE J. ROBINSON.

Sworn to and subscribed before me, this
18th day of March, A. D. 1924.

WILLIAM E. HUGHES,
Notary Public,
(Seal) Kings Co. No. 149.
Kings Co. Register's No. 4149.
New York Co. Clerk's No. 334.
New York Co. Register's No. 4279.
Term expires March 30, 1924.

Supreme Court of the United States

October Term—1923.

ROBINS DRY DOCK & REPAIR COMPANY,
Petitioner,
against
LARS DAHL,
Respondent.

No 870.

BRIEF IN SUPPORT OF PETITION OF ROBINS DRY DOCK & REPAIR COMPANY FOR A WRIT OF CERTIORARI.

POINT I.

The result of the judgment of the Supreme Court of the State of New York for the County of Kings, which petitioner seeks to have reviewed in permitting the application of Section 18 of the Labor Law was to deprive petitioner of rights and privileges granted to him by Sections 24 and 256 of the Federal Judicial Code.

Section 18 of the Labor Law of the State of New York reads as follows:

> "A person employing or directing another to perform labor of any kind, in the erection, repairing, altering or painting of a house, building or structure, shall not furnish, or erect, or

cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances, which are unsafe, unsuitable, or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged."

This Section has been construed by the Court of Appeals of the State of New York to impose a duty upon the employer which is "positive," "imperative," "affirmative," "absolute and unequivocal" (*Stewart* vs. *Ferguson*, 164 N. Y., 553, 556; *Coddy* vs. *Int. R. T. Co.*, 195 N. Y., 415, 419; *Warren* vs. *Post & McCord*, 128 App. Div., 572, unan. affd. 198 N. Y., 624; *Jeffrey* vs. *Miller, Inc.*, 222 N. Y., 135, 138; *Ross* vs. *R. R. Co.*, 231 N. Y., 335; *Amberg* vs. *Kinley*, 214 N. Y., 531; *Martin* vs. *Herzog*, 228 N. Y., 164.)

The Courts of the State of New York have also held that a single plank laid temporarily in the manner in which the plank in the instant case was laid constitutes a scaffold within the meaning of Section 18 of the Labor Laws.

Wright vs. *Smith*, 152 A. D., 476.

The jurisdiction of the Supreme Court of the State of New York in this action is conferred by Sections 24 and 256 of the Federal Judicial Code and is limited by those sections to the enforcement, by a common law remedy, of a right given under the Admiralty Law.

Lars Dahl was injured on the second day of February, 1920, while aboard the steamship "El

Occident" while said steamship was in the navigable waters of the United States. Had this accident happened to Mr. Dahl while he was on the land, there is no question but what his sole remedy would have been under the Workmen's Compensation Law of the State of New York. But solely by reason of the fact that his accident happened on the navigable waters of the United States, and his right of action, if any, accrued to him by virtue of the Admiralty Laws of the United States, he is in the state tribunals seeking to enforce his alleged right by a Common Law remedy under the saving clauses of Sections 24 and 256 of the Federal Judicial Code.

The sections of the Federal Judicial Code referred to after granting *exclusive* admiralty jurisdiction to the Federal courts saves "to *suitors* in all cases the right of a common law remedy where the common law is competent to give it."

There can be no question, therefore, but that the jurisdiction of the courts of the State of New York over this controversy is conferred by the sections of the Federal Judicial Code referred to, and must be limited by those sections as construed by the Supreme Court of the United States and the Federal Courts in Admiralty.

From the time of the earliest decisions of the United States Supreme Court, dealing with these sections, attempts have been made to distinguish the individual cases under consideration, so as to apply State laws which were repugnant to the admiralty law as it was generally enforced throughout the United States. But *in every instance* where the State statute conferred or modified a right given under the maritime law, such state statutes have been held to be unconstitutional. The only

apparent exceptions in this long line of decisions (and it is respectfully submitted they are not exceptions) are those cases where the admiralty law did not afford a right nor a remedy as, for example, the right of an action to recover damages in the case of a death on the high seas; or the right of a lien where the admiralty law gave none. In other cases where the admiralty law gave a lien the state law on the same subject was held to be in conflict and for reasons very apparent.

In the many attempts to distinguish instant cases from the uniform line of decisions of the United States Supreme Court in this connection, it has frequently been suggested that particular classes of persons or rights of action ought not to be included, or ought to receive a different treatment. The latest instance, it is respectfully submitted, is that of the Court of Appeals of the State of New York in the case of Peter Maleeney vs. Standard Shipbuilding Corporation in an opinion rendered December 27, 1923, and reported in 237 New York, at page 250 (Advance Sheets February 23, 1924). In that case the Court has in effect limited the operation of the saving clause to "seamen," which is no more than to say that when Congress said "suitors," what they really meant was "seamen" and that a different rule should be applied to a stevedore or a ship repairer, whose right of action is given by the admiralty law,—a conclusion, it is most respectfully submitted, contrary to all the decisions and not justified by any known rule of construction. And see *Atlantic Transport Co.* vs. *Imbrovek*, 234 U. S., 52, at page 61.

The inconsistency of this ruling would seem to be apparent at the outset, because if the admiralty law does not apply to Lars Dahl's case in the de-

termination of his rights, then under the Workmen's Compensation Law, in effect at the time of his accident, he has no right of action at all in the State courts, and his complaint should have been dismissed. On the other hand, if Mr. Dahl, who is not a seaman but was concededly injured on the navigable waters, is to have his right enforced in the State court by virtue of the saving clause referred to, then it is respectfully submitted under the decisions of the United States courts, his right must be measured in accordance with the admiralty law.

In his charge to the jury, which is quoted at length in the petition herein, the Court states that the maritime law is known by lawyers as the common law, and in the case of *Maleeney* vs. *Standard Shipbuilding Corporation* (*supra*), the Court of Appeals has very strongly intimated that the common law rules applying to master and servant are the same as the admiralty laws by adoption in the Admiralty Court. This is probably true to a limited extent, but certainly Section 18 of the Labor Law, as construed by the courts of the State of New York, is far different from the admiralty rule applied to measure the rights and obligations as they exist between master and servant. In the instant case Lars Dahl, together with a fellow employee, selected a plank which broke and caused his accident. The so-called "snapper" Kilbride, in accepting the plank so selected, under the rules of the common law, was carrying out a mere detail of the work and, under the rule as applied in admiralty, he is a fellow servant. *Dair* vs. *Porto Rico Steamship Company*, 204 N. Y., 341; *Tydeman* vs. *Prince Line*, 102 A. D., 279; *Wells* vs. *Westinghouse*, 147 A. D., 155.

Under the common law and under the admiralty law, the master is not responsible for the negligent acts of a fellow servant. *Earle* vs. *Clyde Steamship Co.*, 103 A. D., 21.

The Court in the instant case has charged the jury that

> "However careful the master, he is ~~not~~ responsible unless the scaffold is in fact a proper one."

Manifestly, if the scaffold breaks, it was not a proper one and by the application of Section 18 of the Labor Laws the defenses available to petitioner under the admiralty law and under the common law for the negligent act of the respondent himself and of his fellow servant, are taken away from him when the suitor in the admiralty cause avails himself of the right given to him, under Sections 24 and 256 of the Federal Judicial Code, of having his cause tried in a state court. The correlative right must immediately flow to the petitioner of having his rights and obligations measured in accordance with the admiralty law. Of that right he has been deprived in in this case.

This Honorable Court has repeatedly recognized the distinction between the admiralty law and the common law, and in the recent case of State Industrial Commission vs. Nordenholt Corporation, 259 U. S., 263, this Court said:

> "When an *employee* working on board a vessel in navigable waters sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he

had been injured on land *while unloading the vessel.* In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied." (Italics mine.)

Again in *Chelentis* vs. *Luckenbach S. S. Co.,* 247 U. S., 372, the Court said as follows:

"The work about which petitioner was engaged is maritime in its nature; his employment was a maritime contract; the injuries received were likewise maritime, and the parties' rights and liabilities were matters clearly within the admiralty jurisdiction. *Atlantic Transport Co.* vs. *Imbrovek,* 234 U. S., 52. And unless in some way there was imposed upon the owners a liability different from that prescribed by maritime law, petitioner could properly demand only wages, maintenance and cure. Under the doctrine approved in *Southern Pacific Co.* vs. *Jensen* (244 U. S., 205), *no State has power to abolish the well-recognized maritime rule concerning measure of recovery, and substitute therefor the full indemnity rule of the common law."* (Italics mine.)

Here, one distinction between the maritime law and the common law is specifically called to attention.

Knapp vs. *MacCaffrey,* 177 U. S., 638.

It seems to the writer that the difference between the common law and the admiralty law as applied

to the instant case is so very wide that there is not much room left for argument. The fellow servant rule, as applied by the common law modified by the State statute, would make Kilbride an *alter ego* of the master. Under the admiralty law Kilbride was Dahl's fellow servant. The rule as to contributory negligence is different. The doctrine of assumed risk has been for all practical purposes abolished under the common law of the State of New York. In admiralty, it is in full force and effect. In short, the difference is between liability and non-liability.

It is this sort of confusion which the Supreme Court of the United States has constantly sought to avoid in its efforts to maintain a uniform maritime law throughout the United States; the avoidance of one measure of rights and damages in one State and an entirely different measure in other States. The case of *Workmen* vs. *N. Y. City,* 179 U. S., 552, was an action for damages to a vessel and the Court here reiterates the importance of maintaining a uniform maritime law in the following language:

> "The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for *every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts,* can be overthrown by conflicting decisions of State courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would

be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port." (Italics mine.)

The Court in concluding expressly warns against a misunderstanding of this particular decision as in any way doubting the correctness of doctrines expounded by the Supreme Court in cases cited in the opinion.

The earliest leading case on the subject is that of *Martin* vs. *Hunter,* 1 Wheaton, 337, where it is pointed out that the jurisdiction of the Supreme Court of the United States in matters of admiralty jurisdiction is exclusive, and that the only right that is saved to *suitors,* is that of a common law remedy.

The next case is *The Moses Taylor,* 4 Wallace, 411, where the Court finally concludes, after a learned discussion of the character of the jurisdiction that, "it is not a remedy in the common-law courts which is saved, but a common-law remedy." This is unambiguous language, and that rule has been followed consistently from that time to the present date.

In the case of *Steamboat Company* vs. *Chase,* 16 Wallace, 522, the same principle is again enunciated and Mr. Justice Clifford leaves no room for doubt on the subject, for he points out clearly the cases where the State Legislature may act in matters which might otherwise have been within admiralty jurisdiction. The Court says (page 530):

> *"Where no remedy exists for an injury in the admiralty courts,* the fact that such courts

exist and exercise jurisdiction in other causes of action leaves the State courts as free to exercise jurisdiction *in respect to an injury not cognizable in the admiralty* as if the admiralty courts were unknown to the Constitution and had no existence in our jurisprudence. Jurisdiction to enforce maritime liens by proceedings *in rem* is exclusive in the admiralty courts. State courts, therefore, are incompetent to afford a remedy in such a case, as they do not possess the power to issue the appropriate process to enforce the lien and give effect to the proceeding. Vested exclusively as such power is in the admiralty courts, it is settled law that the State legislatures cannot authorize State courts to exercise jurisdiction in such a case by a proceeding *in rem.*" (Italics mine.)

This is the theory on which actions for the recovery of damages due to a death on the high seas have been permitted in the admiralty courts, although such a remedy was unknown in the admiralty law. The State of New York abolished the right of action for negligence, as between master and servant, when it enacted the Workmen's Compensation Act, and the only right which Mr. Dahl can seek to enforce here is such right as he may have under the admiralty law. The admiralty law gives him a right which is determined by measuring the duties and obligations which that law has fixed for the master and the servant, but it is respectfully submitted that if the Labor Law of the State of New York is applied in measuring the rights and duties of master and servant, we will have what

Mr. Justice White says in *Workmen* vs. *N. Y. City, supra,* is to be avoided, namely, "no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port."

The suggestion is made that this lack of uniformity refers to the admiralty law in its international sense. This cannot be so, first, for the reason that Mr. Justice White indicates quite the contrary, and the opinion of the Court in this very case (*Workmen* vs. *N. Y. City*), points out the differences between the admiralty law of the various nations, but emphasizes the necessity, however, of a uniform admiralty law *for all the Courts of the United States.*

The latest expression of this Honorable Court on the subject was in cases 366-684, October Term, 1923, the *State of Washington* vs. *W. C. Dawson & Co.,* and *Industrial Accident Commission of the State of California* vs. *James Rolph Company* in an opinion delivered February 25th, 1924, where the Court concludes:

> "The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the States may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare. The Constitution is supreme."

Also see

Scheude vs. *Zenith Steamship Company*, 244 U. S., 646 (affirming 216 Fed. Reporter, 566).

The only negligence complained of in the instant case was the failure of the master to furnish a safe plank. The respondent, together with his fellow servant, however, having selected that plank, it is evident that had the admiralty rules been applied, the Court would have been compelled to dismiss the complaint, and it was only by application of Section 18 of the Labor Law of the State of New York, which to all intents and purposes eliminates the question of contributory negligence and abolishes the fellow servant and assumed risk rules, that the case could have been submitted to the jury and the judgment herein entered.

It is, therefore, respectfully submitted that petitioner has been deprived of the rights and privileges granted to him under the sections of the Federal Judicial Code referred to of having this action tried according to the Admiralty Law.

POINT II.

Section 18 of the Labor Law of the State of New York is repugnant to Article 3, Section 2 of the Constitution of the United States and is therefore unconstitutional when applied in any admiralty action tried in a State Tribunal.

Your petitioner has been allowed a Writ of Error herein to the Supreme Court of the State of New

York, for the County of Kings, to correct the errors of which it is complaining, and the application for a writ of certiorari is made for the reason that the confusion which exists as a result of the conflicting decisions of the various State courts is so great, and the question which is the source of this confusion is so clearly presented herein, that your petitioner has felt that it is most desirable that this Honorable Court should pass upon it and out of an abundance of precaution, in the event that it should be determined that the writ of error is not the proper remedy here, it is respectfully urged that the writ of certiorari ought to be granted.

It seems sufficient to establish the unconstitutionality of Section 18 of the Labor Law when it is sought to be applied in an admiralty action, to refer to the opinion of this Honorable Court in the cases of *State of Washington* vs. *Dawson & Co.*, and *Industrial Accident Commission of California* vs. *James Rolph Co.* (*supra*). In that opinion the decisions are reviewed and the conclusion is again reached that Congress has no power to delegate to the states the right to legislate on this subject. Surely, if Congress cannot so delegate, the legislature of the State cannot of its own initiative so extend its laws as to destroy the uniformity of the application of the admiralty law.

As evidence of the confusion which exists on this subject, reference need only be made to the quoted portions of the charge of the Court in the instant case.

That the learned trial Justice was under an entire misapprehension as to the nature of the maritime law in its application to actions of the character of the one at bar, is manifest, for certainly the

common law and the admiralty law are two entirely distinct bodies of jurisprudence.

But even if we were to concede, for the sake of argument, that the common law rules and the admiralty law rules, so far as they apply to the declaration of the rights and duties arising as between master and servant, are concerned, are similar, surely Section 18 of the Labor Law is an entire innovation in this field. Section 18 of the Labor Law, as it has been construed by the Court of Appeals of the State of New York, in repeated instances, creates an entirely new duty, which has been described as "positive", "imperative", "affirmative", "absolute and unequivocal."

That the Courts of Admiralty of the United States have provided both a right and remedy for persons injured upon the navigable waters by reason of negligence needs no citation of authority for its support. The cases can be multiplied on this point. Therefore, it follows that if Section 18 of the Labor Law is conceded to abolish all of the defenses available to the master under the admiralty law, it becomes at once repugnant to article 3, Section 2 of the Constitution of the United States and is, therefore, unconstitutional. The situation is one which comes exactly within the oft-repeated language of the Supreme Court in *Knickerbocker Ice Company* vs. *Stewart* (*supra*), as follows:

> "As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: *The Constitution itself adopted and established as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them*

and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere."

* * * * * * * *

"Obviously, *if every State may declare the rights and liability incident to maritime employment,* there will at once arise the confusion and uncertainty which the framers of the Constitution foresaw and undertook to prevent." (Italics mine.)

Section 18 of the Labor Law certainly violates the rules prescribing the liability of the employer under the maritime law, and it is, therefore, when so applied as in the case at bar, repugnant to the Constitution of the United States, and unconstitutional.

CONCLUSION.

The petitioner therefore submits that this is a proper case for the issue of a writ of certiorari.

Dated, New York, N. Y., March 18, 1924.

Respectfully submitted,

A. G. MAUL,
Attorney for Petitioner.

(15)

OCT 24 1924

WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 316.

ROBINS DRY DOCK & REPAIR COMPANY,
Plaintiff-in-Error,

v.

LARS DAHL,
Defendant-in-Error.

ON WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK, FOR THE COUNTY OF KINGS.

BRIEF OF ARGUMENT ON BEHALF OF PLAINTIFF-IN-ERROR.

A. GEORGE MAUL,
Counsel for Plaintiff-in-Error.

PRESS OF FREMONT PAYNE, INC., 80 Washington St., New York City.

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Supreme Court of the United States

OCTOBER TERM, 1924.

No. 316.

ROBINS DRY DOCK & REPAIR COMPANY, Plaintiff-in-Error, v. LARS DAHL, Defendant-in-Error.	On Writ of Error to the Supreme Court of the State of New York for the County of Kings.

BRIEF OF ARGUMENT ON BEHALF OF PLAINTIFF-IN-ERROR.

Statement of the Case.

The Question Before the Court.

Concisely stated, the question presented to this Honorable Court for its determination is as follows:

Does Section 18 of the New York State Labor Law when applied in a Tort action within exclusive Admiralty Jurisdiction (but tried in a State Court under the "saving clause" of Sections 24 and 256 of the Federal Judicial Code) so materially alter

characteristic features of the maritime law, as to constitute a violation of Section 2 of Art. III of the constitution of the United States and a denial of the validity of said Sections 24 and 256; and, does such application of the State Statute deprive the plaintiff-in-error of the right and privilege of having his cause tried in such State Court under the Maritime Law?

The Manner in Which This Question is Raised.

Lars Dahl (the defendant-in-error) brought suit in the Supreme Court of the State of New York for the County of Kings, alleging that on the 2nd day of February, 1920, while he was employed by the plaintiff-in-error, on board the steamship "El Occident," solely as a result of the negligence of said Robins Dry Dock & Repair Company, its agents, servants and employees he was violently thrown and precipitated from a platform in the engine room of said steamship to the floor of the engine room; that as a result of said fall and said negligence, he sustained an injury for which he claimed damages in the sum of $30,000 (Trans. pp. 3, 4 and 5). The accident having happened on the navigable waters of the United States and the Workmen's Compensation Act being inapplicable, the suit was brought in the State Court under the enabling provisions of Sections 24 and 256 of the Federal Judicial Code. An amended complaint was served and filed, and upon the answer to the amended complaint, issue was joined and the case noticed for and brought to trial on the 26th and 27th days of April, 1923 (Trans. p. 14). The case had been tried about a year prior (Trans. p. 24), and a verdict and judgment for the plaintiff was

set aside and reversed and a new trial, on April 26th and 27th, 1923, was had as a result of the direction of the Appellate Division of the Supreme Court (Dahl v. Robins Dry Dock & Repair Company, 203 A. D. [N. Y.], 795).

Upon the trial on April 26th and 27th, 1923, the attorney for Lars Dahl moved an amendment to his complaint which in words and substance alleged that the negligence of the Robins Dry Dock & Repair Company consisted in a failure of the employer to comply with the requirements of the Labor Law of the State of New York (Trans. p. 14). To this amendment, the trial counsel for the plaintiff-in-error objected on the ground that the application of the Labor Law of the State of New York and Section 18 thereof was unconstitutional in that it modified and changed the fundamental Admiralty Law by imposing additional duties on the defendant (Robins Dry Dock & Repair Company) and deprived it of its defences and changed the rights and duties of the parties, thus destroying the uniformity of the Admiralty Law as contemplated by the Constitution of the United States (Trans. p. 14). The amendment was allowed "to conform with the opinion of the Appellate Division" and exception duly taken (Trans. p. 15).

After the completion of the taking of the testimony on behalf of the plaintiff, a motion was made to dismiss the complaint. The trial court at that time stated that it was compelled to apply Section 18 of the Labor Law to the facts of the case (see Opinion in Dahl v. Robins, 203 A. D. [N. Y.], 792), to which application the trial counsel for the plaintiff-in-error objected and excepted on the same grounds (Trans. p. 66). Section 18 of the Labor Law of the State of New York, reads as follows:

> "A person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure, shall not furnish or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged."

These motions were again renewed, denied, and exception taken, at the end of the whole case (Trans. p. 47), and the court then charged the jury in language which embodies the proposition of law that is involved in the question now before this honorable court for determination (see Trans. pp. 78 and 79). The jury rendered a verdict in favor of the plaintiff below (Lars Dahl), and against the Robins Dry Dock & Repair Company, in the sum of $15,000.00, and from the judgment entered upon such verdict and from an order denying a motion for a new trial, an appeal was taken to the Appellate Division of the Supreme Court of the State of New York for the Second Department, but the verdict and judgment were unanimously affirmed.

Thereafter, an application was made for leave to appeal to the Court of Appeals of the State of New York, which is the highest court to which the plaintiff-in-error could go. Such application was denied and thereupon the plaintiff-in-error applied to this court for a Writ of Error which was granted by the Honorable Louis D. Brandeis, Associate

Justice of this court, on the 29th day of February, 1924.

Subsequently, and out of abundance of caution, the petitioner applied to this court for a Writ of Certiorari to have the determination of the Supreme Court of the State of New York herein reviewed. Determination on this application has been held in abeyance until the hearing of the cause upon the merits on the Writ of Error theretofore allowed.

The Facts.

Lars Dahl was a machinist's helper (Trans. p. 16), employed by the Robins Dry Dock & Repair Company. On the 2nd day of February, 1920, he was one of a gang, composed of six men and a foreman or "snapper" (Trans. p. 16, and p. 36, fol. 68), engaged in lowering a valve into the engine room (Trans. p. 33), of the steamship "El Occident," which was moored in the navigable waters of the United States at a dry dock or pier in the yard of the plaintiff-in-error. For this purpose, a section of the iron grating in the engine room, about 10 feet long and about 2½ feet wide had been removed (Trans. p. 16). For the purpose of enabling these men to lower the valve in place, wooden planks had been placed over the crossbeams from which the grating had been removed (Trans. p. 16). On the morning of the accident, it was observed that one of the planks necessary to cover the opening was missing or unsuitable, and Kilbride, the "snapper" or foreman of this gang of seven men, directed them to secure an additional plank (Trans. pp. 16 and 17). The men brought two different planks which were found unsuitable

because they were too short (Trans. pp. 17 and 27), but Lars Dahl (defendant-in-error), and his companion finally selected a plank, the dimensions of which were estimated by the defendant-in-error at 14 or 16 feet long, 6 inches wide and 2 inches thick (Trans. p. 17), and which Dahl himself, and his companion declared to be "all right" (Trans. pp. 27, 28 and 29, at fols. 54 and 57). It was conceded by all the witnesses that the plank was new, apparently sound, suitable in its dimensions and the type of plank ordinarily used for this purpose. The plank finally selected was one chosen by the injured man himself and his companion. All the witnesses agreed that the plank showed no evidence of weakness or defect on its surface (testimony of Dahl, Kenney & Kilbride). It further appeared that Dahl had been a sailor and on sailing vessels for twelve years (Trans. p. 24), and worked on many ships in the Robins yard (Trans. p. 26), and frequently stood on and was sent for planks (Trans. p. 26). After the plank was brought to the place where it was to be used, Kilbride also said, "It is all right" (Trans. p. 18), and it was placed in position. Kilbride, the "snapper" or foreman, then stood on the plank to assist in lowering the valve and Dahl, then stepped from the deck to the plank to assist him (Trans. p. 18). When the plaintiff stepped upon the plank it broke and he fell a distance of 30 feet while the foreman caught hold of a rope and thus escaped injury. After the accident the plank was examined by Dahl's witness Kenney who testified that there was a knot in the plank and it showed near the edge of one end which was an inch or an inch and a half in diameter and ran right across the board in the interior (Trans. p. 40).

As a result of his fall, the plaintiff was injured. Upon the trial of the action, in order to conform with the opinion of the Appellate Division of the Supreme Court for the Second Department (Dahl v. Robins, 203 A. D. [N. Y.], 792), the complaint was amended by the insertion of an allegation to the effect that the defendant failed to furnish the plaintiff with a safe scaffold, as required by the Labor Law of the State of New York (Trans., p. 14).

Examination of the oral testimony of the witnesses which is contained in the transcript, pages 15 to 74, and to which specific reference has heretofore been made, shows conclusively that the plank selected by the defendant-in-error himself and his companion Kenney, was apparently suitable for the purpose for which it was used and if there were any neglect or failure of any kind in the selection, it was solely the neglect or fault of the defendant-in-error himself and his fellow workers, for Kilbride who finally accepted the plank, was a fellow servant and worked with Dahl and the other men (Kenney's testimony, Trans. p. 36). In any event, the selection, under the circumstances, was a detail of the work in which they were all engaged. This point is more fully treated hereinafter in the brief.

It should be here mentioned that there was evidence in the case offered by defendant-in-error as to a so-called custom. An examination of this testimony, however, clearly indicates that what the witnesses termed "custom" was nothing more nor less than the most primitive method of ascertaining the strength of a plank It cannot be better described than by using the language of the witnesses which is found on page 58 of the transcript:

> "You take a plank, assuming you are going to use it for that job or any other job, you take a plank and lay it on some object and you jump on it, and you test it out with your weight, and if there was any weak spot in that it would show, and then you turn it on the other side. And any man that knows his business, or ever done anything like it, will do it, and it is customary, always used."

Testimony as to this custom is well summed up in the language of the witness just quoted, but it is obvious that the failure, if there was any failure, to so test the plank in question, was as much the duty of the defendant-in-error as it was of his fellow servant Kilbride, for Dahl himself selected the plank.

Upon the trial, the plaintiff-in-error and petitioner objected and excepted on every occasion where the Labor Law was applied. The further facts which occurred upon the trial in connection with the application of Section 18 of the New York State Labor Law to this case will be set forth in detail under the Specification of Errors.

Specification of Errors by the Supreme Court of the State of New York for the County of Kings.

FIRST.—The Supreme Court of the State of New York, through its trial justice, erred in permitting an amendment of the complaint upon the trial of the action, to include an allegation which permitted the mutual rights and obligations of the plaintiff-in-error and the defendant-in-error to be measured by Section 18 of the Labor Law of the State of New York in the manner set forth in the transcript, pages 14 and 15, as follows:

"Mr. Burke: I move to amend paragraph 3 of the complaint herein to read as follows:

Third: 'That on or about the 2nd day of February, 1920, while plaintiff was in the employ of the defendant working on the said steamship El Occident, a plank scaffold on which plaintiff was walking and standing while in the performance of his work as a servant of the defendant broke and caused plaintiff to fall into the hold of said vessel.'

Fifth: 'That the aforesaid injuries to the plaintiff were caused solely by and through the negligence of the defendant in that the defendant negligently and carelessly failed to furnish plaintiff with a safe scaffold, and a safe place to work, and safe ways and works on or in which to work, and negligently and carelessly furnished plaintiff and its other workmen an unsafe, inadequate and unsuitable scaffold and plank on which to work, which scaffold and plank were not sufficient thickness or strength for the purpose for which they were provided by defendant, and were made of wood having a short grain, and which contained a knot or knots which diminished the strength of said scaffold and plank, and defendant failed to inspect or test said scaffold and plank and scaffold, and unsafe place to work and failed to furnish plaintiff with a safe scaffold as required by the Labor Law of the State of New York.'

Mr. Brennan: I object to the amendment on the ground that it is plainly an amendment

intended to conform with the opinion of the Appellate Division in this case. And I object on the further ground that it is an attempt to apply Section 18 of the Labor Law of the State of New York to this issue, and the application of Section 18 of the Labor Law is unconstitutional in that it modifies and changes the fundamental admiralty law by imposing additional duties on the defendant, depriving it of its defenses and changes the rights and duties of the parties, thus destroying the uniformity of the admiralty law as contemplated in Article 3, Sections 24 and 256 of the United States Judicial Code; in short, that it is unconstitutional.

The Court: I will allow the amendment on the ground that it is made to conform with the opinion of the Appellate Division. So long as the decision in the Wilkes case remains the law I am bound by it no matter whether it conforms to my ideas of the law or not. It is unfortunate that that case has not yet been finally determined, and this case is merely following in the footsteps of the Wilkes case.

Mr. Brennan: Exception."

For the reason that such amendment destroys the uniformity of the Admiralty Law of the United States as contemplated by Section 2, Article III of the Constitution of the United States and denies the validity of Clause 3 of Sections 24 and 256 of the Federal Judicial Code.

SECOND.—The Supreme Court of the State of New York, through its trial justice, erred in refusing to dismiss the complaint at the end of the plaintiff's

case and in applying Section 18 of the Labor Law of the State of New York, in reaching its determination on the motion to dismiss the complaint (Trans., p. 66) as follows:

> "Mr. Brennan: I move to dismiss the complaint, if the court please, on the ground that the plaintiff has failed to establish a cause of action in that he has failed to show any negligence on the part of this defendant, and has failed to show his own freedom from contributory negligence.
>
> The Court: Denied.
>
> Mr. Brennan: Exception. May I ask at this time if it is the intention of the court to apply Section 18 of the Labor Law to this case?
>
> The Court: I am forced to.
>
> Mr. Brennan: Then I would like at this time, if the court please, to put an exception on the record with regard to that for the reason that I assume that, if the section were not applied, the motion at this time would very likely be granted, therefore I would like to put my exception on the record at this time to your Honor's statement.
>
> I except to the application of Section 18 of the Labor Law of the State of New York on the ground that said section modifies and changes the fundamental admiralty law by imposing additional duties on the defendant, and depriving it of its defenses, and changes the rights and duties of the parties, thus destroying the uniformity of the admiralty law as contemplated in Article 3, Sections 24 and

256 of the United States Judicial Code, inasmuch as the plaintiff is only in this court by virtue of the jurisdiction conferred upon him by Sections 24 and 256 of the United States Judicial Code, and his rights must be measured by the admiralty and maritime laws, and therefore the application of Section 18 of the Labor Law of the State of New York is unconstitutional."

THIRD.—The Supreme Court of the State of New York, through its trial justice, erred in denying the motion of the plaintiff-in-error and petitioner, made at the close of the whole case, for the reasons set forth in the second assignment of error.

FOURTH.—The Supreme Court of the State of New York, through its trial justice, erred in directing the jury to apply Section 18 of the Labor Law of the State of New York in determining the questions of negligence and contributory negligence in the following language, which is found on pages 77, 78 and 79 of the transcript:

"In all cases of this kind that are brought in the State Court, we proceed, under ordinary circumstances, along certain lines that are imposed upon the plaintiff. He has the burden of proving two things. He must first prove that that defendant was negligent. And by 'negligence' is meant that the defendant did not conduct itself in a reasonably prudent and careful manner such as a reasonably prudent and careful man would have done under the circumstances. And secondly, that he was free from any negligence that contributed to the

injury. In other words he must prove that the injury was the result solely of the negligence of the defendant, and that he himself comported himself in a reasonably prudent manner, having in mind the situation as it developed.

There is going to be considerable confusion in this case because of what I might term the conflict of laws, and I do not feel at all easy in stating to you what the law is, because, as we read the law that pertains to this case, there is confusion in the minds of lawyers, as there is in the minds of judges, and the law is still in a very much unsettled and disturbed condition. But the law is as I give it to you, and you must accept it, and if I am in error with respect to it the aggrieved party will have his remedy as a result. And that confusion grows out of this: This is what we call a maritime tort, an action in negligence that is governed by the maritime laws, the admiralty laws, the laws that pertain to navigable waters in this country. And under ordinary circumstances such cases should be brought in the United States Court. It is difficult enough for a State court judge to give the law that is the State law without attempting to give United States law, or the law that applies in United States cases, affected, influenced and modified to some extent by the laws of the State. And so the law permits, even in a maritime case such as should ordinarily be brought in the United States Court, to be tried in a State court. But the maritime law is applied, and those maritime laws are known by lawyers as

the common law. Those are laws that have developed as a result of experience, and have been indicated in decisions of many many years ago, and have become the basic law of the land, for the law in the United States is what we call the common law. And under the common law the same rule applies in this case as the rules that I have laid down to you, that the burden is upon the plaintiff to prove that the defendant was negligent, and that he himself was free from any contributory negligence. In this case, however, comes a provision known as Section 18 of the Labor Law, and Section 18 of the Labor Law reads as follows: 'A person employing or directing another to perform labor of any kind, in the erection, repairing, altering or painting of a house, building or structure, shall not furnish, or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances, which are unsafe, unsuitable, or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged.' And the decisions hold that Section 18 of the Labor Law does not make an employer, as we term him, the "master", in this case the defendant, an insurer of the scaffold—and this plank within the meaning of the law is a scaffold—it does not make the master an insurer of the safety of the scaffold under all conditions, it requires the scaffold to be so safe as to give proper protection to the workmen engaged in their duty.

However careful the master, he is responsible unless the scaffold is in fact a proper one, proper to protect the workman in the performance of his work. No law of the State can modify or affect the rights of workmen who are operating under the maritime law. And it has been held that this Section 18 of the Labor Law does not modify or affect the law, but may be read in conjunction with the law. And as I understand the law to be, in determining in this case whether the defendant was negligent—for the plaintiff must still prove that the defendant was negligent—you must have in mind that there was in existence in the State a law which imposed upon the defendant the burden and the necessity of providing a scaffold that was proper for the workman to work upon. And in this case, in the light of that law, you must determine whether the defendant knowing the law, as it was called upon to know it, acted negligently, and whether or not the plaintiff has proved, by a fair preponderance of evidence, that it acted negligently. If you find that in view of Section 18 of the Labor Law the defendant did act negligently, then you go to the next proposition. If you find that it did not act negligently, that ends this case, and you must render a verdict in favor of the defendant. Assuming, for the purpose of bringing to your attention all of the law in the case, that you find under these circumstances the defendant was negligent, then you come to the next proposition, was the plaintiff free from negligence that contributed to the injury. If he was free, then he

is entitled to a verdict. If he did something that contributed to the injury then he is not entitled to a verdict."

for the reason that Section 18 of the Labor Law of the State of New York, as thus applied, materially changed the characteristic features of the Admiralty Law on the questions of negligence and contributory negligence and the duties and obligations of employer and employee and therefore violated Section 2 of Article III of the Constitution of the United States as construed by this court, and denied the validity of Sections 24 and 256 of the Federal Judicial Code.

FIFTH.—The Supreme Court of the State of New York, through its Appellate Division for the Second Department, erred in refusing to reverse the judgment for all the reasons assigned in the First, Second, Third and Fourth Specifications of Error.

ARGUMENT.

POINT I.

The jurisdiction of the Supreme Court of the State of New York in actions of this character is conferred by Clause 3 of Sections 24 and 256 of the Federal Judicial Code and such jurisdiction is limited to the enforcement by a common law remedy of a right given under the Admiralty Law.

Lars Dahl was injured on the second day of February, 1920, on board the steamship "El Occi-

dent" while said steamship was in the navigable waters of the United States. Had this accident happened to Mr. Dahl while he was on the land there is no question but what his sole remedy would have been under the Workmen's Compensation Law of the State of New York. But solely by reason of the fact that his accident happened on the navigable waters of the United States and his right of action, if any, accrued to him by virtue of the Admiralty Laws of the United States, he is in the State tribunals seeking to enforce his alleged right by a common law remedy under the "saving" clauses of Sections 24 and 256 of the Federal Judicial Code (Dahl v. Robins, 203 A. D. [N. Y.], 794).

The sections of the Federal Judicial Code referred to after granting exclusive admiralty jurisdiction to the Federal courts saves "to suitors in all cases the right of a common law remedy where the common law is competent to give it."

There can be no question therefore, but that the jurisdiction of the courts of the State of New York over this controversy must be limited by those sections as construed by the Supreme Court of the United States and the Federal courts in admiralty.

From the time of the earliest decisions of the United States Supreme Court in connection with these sections, attempts have been made to distinguish the individual cases under consideration, so as to apply State laws which were repugnant to the admiralty law as it was generally enforced throughout the United States. But in every instance where the State statute conferred or modified a right already given under the maritime law, such State statutes have been held to be unconsti tutional.

Southern Pacific Co. v. Jensen, 244 U. S., 205; Knickerbocker Ice Co. v. Stewart, 253 U. S., 149; Industrial Commission v. Nordenholt Co., 259 U. S., 263; State of Washington v. Dawson & Company, Oct. Term, 1923, No. 366; Schwede v. Zenith Steamship Co., 244 U. S., 646 (affirming 216 Fed., 566); Chelentis v. Luckenbach Steamship Co., 247 U. S., 372; Knapp v. MacCaffrey, 177 U. S., 638; Workmen v. N. Y. City, 179 U. S., 552; Steamboat Co. v. Chase, 16 Wall., 522.

The only apparent exceptions in this line of decisions (and it is respectfully submitted they are not exceptions) are those cases where the admiralty law did not afford either a right or a remedy as, for example, the right of an action to recover damages in the case of a death on the high seas; or the right of a lien where the admiralty law gave none.

Western Fuel Co. v. Garcia, 257 U. S., 233;
The Lottawanna, 21 Wall., 558;
The J. E. Rembell, 148 U. S., 1.

In thus attempting to distinguish instant cases from the long and uniform line of decisions of this honorable court on the same subject, it has frequently been suggested that particular classes of persons ought not to be included within the rule or ought to receive different treatment. An instance of this is the recent amendment to Clause 3 of Sections 24 and 256 by Act of June 10, 1922, declared by this court to be unconstitutional. At the time of the passage of that amendment it was stated to the Congress by its proponents that the objectionable feature had been removed by con-

fining its application to local workers; but the fallacy of such contention was clearly pointed out by this court in the case of State of Washington v. Dawson (supra), when this court stated that any inequities which may arise from the situation are within the power of Congress to alter by enacting "statutes of general application embodying its will and judgment," as was done in the matter of prescribing the liability of interstate carriers, thereby *abrogating local rules.* (N. Y. C. R. R. Co. v. Winfield, 244 U. S., 147.) In that same case the concluding language of the court, it is respectfully submitted, constitutes a complete answer to every question in the case now under consideration. Mr. Justice McReynolds, speaking for the court, said:

> "The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the States may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare. The Constitution is supreme."

The "Saving Clause" Requires Rights to be Measured by Admiralty Law.

The saving clause of Sections 24 and 256 of the Federal Judicial Code now under consideration, reads as follows:

> "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

This clause has been many times construed by the Federal Courts. *The earliest case on the subject* is *Martin* v. *Hunter,* 1 Wheaton, 337, where it is held that the jurisdiction of the courts of the United States in matters concerning the Admiralty and Maritime Law is exclusive and that the only right that is saved to suitors is that of a *common law remedy.*

The whole subject is aptly summed up in a brief general rule drawn from the cases in Corpus Juris, Vol. 1, page 1253, as follows:

> "The clause saving to suitors a common law remedy where the common law is competent to give it is intended to save the remedy or *right of action* in those courts which proceed according to the course of the common law as distinguished from admiralty proceedings, and the words 'common law remedy' do not necessarily imply an action or remedy obtainable in a common law court, but are equivalent to *'the means employed to enforce a right or redress an injury.'* (Citing: Knapp, etc. Co. v. Caffrey, 177 U. S., 638; The Glide, 167 U. S., 606; Moran v. Sturges, 154 U. S., 256; The Belfast, 7 Wall. (U. S.), 624; The Moses Taylor, 4 Wall. (U. S.), 411; Ashbrook v. The Golden Gate, 2 F. Cas., No. 574; The Isabella, 13 F. Cas., No. 7100; Johnson v. Westerfield, 143 Ky., 10; Berwin v. The Matanzas, 19 La. Ann., 384; Albany City Ins. Co. v. Whitney, 70 Pa., 248.)

In *The Moses Taylor,* 4 Wallace, 411, after a learned discussion of the character of this juris-

diction, this court said specifically that "It is not *a remedy in the Common Law* Courts which is saved, but *a Common Law Remedy.*"

In Chelentis v. Luckenbach Steamship Co., 247 U. S., 372, this was said on page 384:

> "The distinction between rights and remedies is fundamental. *A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury.* Bouvier's Law Dict. Plainly we think, under the saving clause a right sanctioned by the maritime law may be enforced by any appropriate remedy recognized at common law; *but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by Common Law standards rather than those of the Maritime Law.* Under the circumstances here presented without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea."

This language is so clear and unmistakable as to meaning, that when considered with all of the other utterances of this court on the same subject, it does seem idle to continue with citations of authority, but in view of the fact that it has been argued so seriously that another right should be substituted for the right which Mr. Dahl had, if any, under the Maritime Law, we are submitting herewith further authority on this point.

In the case last quoted the court wrote as follows (p. 382):

"Under the doctrine provided in *Southern Pacific Co.* v. *Jensen,* no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the Common Law. Such a substitution would distinctly and definitely change or add to the settled Maritime Law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States.'"

And again in the case of *Southern Pacific Co.* v. *Jensen,* 244 U. S., 205, the court used this language:

"Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Courts, 'saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it.' The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction. The Hine v. Trevor, 4 Wall., 555, 571, 572; The Belfast, 7 Wall., 624, 644; Steamboat Co. v. Chase, 16 Wall., 522, 531, 533; The Glide, 167 U. S., 606, 623. And finally this remedy is not consistent with the policy of Congress to encourage investments in ships manifested in the Acts of 1851 and 1884 (Rev. Stats., S. 4283-4285; S. 18, Act

of June 26, 1884, c. 121, 23 Stat. 57), which declare a limitation upon the liability of their owners. Richardson v. Harmon, 222 U. S., 96, 104)."

And again in Knickerbocker Ice Co. v. Stewart, 253 U. S., 149, 159, after quoting the Jensen case, the following:

> "*In Southern Pacific Co.* v. *Jensen,* we said: 'Under the saving clause *a right sanctioned by the maritime law* may be enforced through an appropriate remedy recognized at common law; *but we find nothing therein which reveals an intention to give to the complaining party an election to determine whether the defendant's liability shall be measured by common law standards rather than by those of the maritime law.' Thus we distinctly approved the view that the original saving clause conferred no substantive rights and did not authorize the states to do so. It referred only to remedies and to the extent specified permitted continued enforcement by the State Courts of rights and obligations founded on maritime law.*"

This limitation on the power of the States to interfere with the uniform Federal Maritime Law applies equally to Judicial Decisions as was pointed out by this court in the *Knickerbocker Ice Co.* case just cited. Certainly the language could not have been more explicit than that of Mr. Justice McReynolds, who speaking for the court then said:

> "As the plain result of these recent opinions and the earlier cases upon which they are

based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. *Moreover, it took from the States all power by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations.*"

This must necessarily be the rule if the Constitution is to be supreme and the Federal Courts' jurisdiction exclusive, for otherwise, as stated by this court in *The Hine* v. *Trevor,* 4 Wall., 555, if the State Legislatures or the State Courts are permitted to alter the characteristic features of the Admiralty Law by giving the suitor such remedies as might afterwards be indicated by the State Statutes,

> "this would have enabled the States to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus, the exclusive jurisdiction of the Federal Courts would be defeated."

The decisions of this court seem to the plaintiff-in-error to hold beyond question that (to repeat the language of the court in *Knickerbocker Ice Co.* v. *Stewart*) only "*a right sanctioned by the mari-*

time law may be enforced" in the State Courts and therefore Section 18 of the Labor Law not being such a *right,* its substitution for the maritime law denies the validity of the saving clause. However the Court of Appeals of New York, and the Appellate Division have held to the contrary and hence this discussion is made necessary.

In the instant case the trial Justice, in permitting the amendment of the complaint said: "I will allow the amendments on the ground that it is made to conform with the opinion of the Appellate Division. So long as the decision in the Wilkes case remains the law I am bound by it no matter whether it conforms to my ideas of the law or not. It is unfortunate that that case has not yet been finally determined, and this case is merely following in the footsteps of the Wilkes case" (referring to Dahl v. Robins (supra), and Wilkes v. United Marine Contracting Corporation, 199 App. Div. (N. Y.), 788).

In conclusion under this point, we can do no better than to repeat here the language of this court in the *Jensen* case (supra) that there is nothing in the saving clause *"which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by Common Law standards rather than those of the Maritime Law;"* and to emphasize the statement in the Stewart case "that the original saving clause conferred no substantive rights and *did not authorize the States to do so."*

The question then arises: Does the Section of the Labor Law of the State of New York complained of, modify the material characteristics of the Admiralty Law and does it confer substantive rights if applied in the instant case?

POINT II.

Section 18 of the Labor Law of the State of New York when applied to an admiralty action materially alters the characteristic features of the Federal Maritime Law, and is, when so applied, repugnant to the Constitution of the United States.

The Appellate Division of the Supreme Court of the State of New York plainly thought that the Admiralty Law was "supplemented or modified" by this Statute, for in passing upon the first appeal in this case, the following language appears on page 796, in Vol. 203 of the Appellate Division:

> "The tort was a maritime tort, and local in its nature. In such case, the Admiralty Law is supplemented or modified by the State Statute." (Citing: Western Fuel Co. v. Garcia, 257 U. S., 233; Industrial Commission v. Nordenholt Corporation, 259 id., 263; Wilkes v. United Marine Contract Corporation, 199 App. Div., 788.

It seems so obvious when a State Legislature or a State Court seeks to impose a rule for the measuring of liability and fixing the duties as between master and servant, materially different from those already long established in the Maritime Law of the Nation, that such attempt is a violation of the letter and spirit of the Constitution as interpreted by this court, that it may be superfluous to here argue or set forth the authorities.

In the first place this court and other Federal Courts have repeatedly held that any attempt to change the measure of damages is a violation of the rules heretofore laid down. Certainly if the attempt to change the measure of damages is a material characteristic which cannot be affected by State Legislation, how much more so must be the very measure which fixes or determines the question of liability or non-liability.

Changes in the Law Made by Section 18 of the Labor Law.

Section 18 of the Labor Law of the State of New York as construed by its Court of Appeals, when applied to the instant case, has the following effect:

FIRST.—It makes an ordinary plank selected by the injured workman for the purpose of temporarily standing upon it, a "scaffold" (Charge of Court, Trans., p. 78) (Warren v. Post, 128 A. D., 572; Chaffe v. Union Dry Dock Co., 68 A. D., 578).

SECOND.—It changes the Common Law and Admiralty rule that the erecting of a scaffold was a detail of the work to an *absolute* duty resting on the master (Roger v. Delaware, etc., Rail Road Co., 64 A. D., 134; Stewart v. Ferguson, 34 A. D., 515; Gombert v. McKay, 201 N. Y., 27; Caddy v. I. R. T. Co., 195 N. Y., 415).

THIRD.—Section 18 of the New York Labor Law changes the duty of the master from that of using reasonable care to a duty which is "positive," "affirmative," "imperative," "absolute and unequivocal" and although the Court of Appeals has said

that it does not make the master an insurer, nevertheless, to use the language of the Court of Appeals and the language of the trial court here complained of:

> "however careful the master, *he is responsible unless the scaffold is in fact a proper one* (Trans., pp. 78-79). (And see Maleeney v. Standard Ship Bldg. Corporation, 237 N. Y., 250; Stewart v. Ferguson, 164 N. Y., 553, 556; Caddy v. I. R. T. Co., 295 N. Y., 415, 419; Warren v. Post & McCord, 128 App. Div., 572; Jeffrey v. Miller, Inc., 22 N. Y., 135, 138; Ross v. Railroad Co., 231 N. Y., 335; Amber v. Kinley, 214 N. Y., 531; Martin v. Herzog, 228 N. Y., 164; Smith v. Variety Iron Works Co., 147 App. Div., 242, affd. 208 N. Y., 543; Holloway v. McWilliams, 97 A. D., 360.)

It also seems clearly settled that the duty does not depend on knowledge nor does the master's liability depend on any other negligence than the violation of the Statute.

FOURTH.—The fellow servant rule is effectively abolished as the Statute is a positive prohibition on the master without exception on account of the carelessness of his servants. (Halloway v. McWilliams, 97 A. D., 360; McLaughlin v. Eidlitz, 50 A. D., 518; Healey v. Burke, 35 Misc., 384; Hutton v. Huldbrook, 139 Fed., 734; Riley v. McNulty, 150 A. D., 650; Warren v. Post, 128 A. D., 572.)

The common rule and Admiralty rule as to the doctrine of fellow servant are so generally well known and accepted that it is unnecessary to cite authority. The changes above indicated and the very language of the decisions referred to show be-

yond peradventure that the State Statute in question converts a situation where the master is not liable under the law and facts to one of unescapable liability.

In the instant case no negligence was proved other than the fact that the plank which Dahl himself selected broke, or, if there were any other neglect, it was that of his fellow servant Kilbride—a situation which would have demanded an instant dismissal of the complaint under any other circumstances. But, when we apply the Statute, the court tells the jury in words and in substance that if the plank breaks, it is not "in fact a proper one" and the master becomes immediately liable. In short, the charge of the court in this case in connection with the Labor Law of the State of New York, amounted to a direction to the jury to bring in a verdict for the plaintiff.

If a suitor, the *locus* of whose accident brings him within Admiralty jurisdiction, can choose as between a forum where all of the defences available to the defendant are practically taken away by a State Statute such as the Labor Law and a forum, where those defences are, and always have been, in full force and effect, the effect is to deprive the Federal Courts at once of jurisdiction for obvious reasons.

But, as this court recently stated (State of Wash. v. Dawson, Oct. Term, 1923, No. 366), if it be said that this is injustice or a hardship upon any particular class of persons, then the remedy is obvious, for Congress has full power to act.

When the Court of Appeals of the State of New York in the case of *Maleeney* v. *Standard Ship Building Corporation,* 237 N. Y., 250, in passing

upon this same Section of the Labor Law of the State of New York, in an admiralty case, permitted it to be applied, it is respectfully submitted (to adopt the suggestion of this court in the case of *Industrial Commission* v. *Nordenholt*), that court made deductions from *Western Fuel Co.* v. *Garcia* and *Grant Smith Co.* v. *Rhode,* which were unwarranted and they proceeded again upon an erroneous view of the Federal Law. All of the cases decided by this honorable court have specifically prohibited the application of the rule made by the court in that case.

Analogous Cases Already Decided by This Court.

The plaintiff-in-error earnestly contends that the point here in question has by analogy, been decided by this honorable court in the case of Schwede v. Zenith Steamship Co., 244 U. S., 646. While the decision referred to was a memorandum decision, reference is made in the reports to the opinion of the Circuit Court of Appeals in 216 Fed., 566.

In that case the plaintiff was a wheelsman on the "Saxona," a vessel operating on the Great Lakes. He claimed that his injury was due to a defective rigging as well as to an improvident order made while the vessel was moored to the dock in the river at Cleveland, Ohio. The contention was made there, as here, that the defendant might demand the application of the Ohio Employers Liability Act, to modify the Maritime Law respecting the rights, duties and liabilities of the master. But the Circuit Court, speaking through Killets, J., page 67, said:

> "It is clear that the plaintiff could have proceeded in admiralty for an injury arising in

the course of such employment either *in rem* or *in personam*, in which case his rights would be determinable only by the principles of the Maritime Law; and it seems therefore to be the contention of his counsel that because of the language above quoted from the Judicial Code, (the saving clause), he has the option of entering the State Court and at law there work out his rights by the law of the forum, enjoying whatever advantages he believes the State Law offers to one complaining of injuries received in his master's service."

Then, after calling attention to the fact that the principles of the general Maritime Law in force in the United States are to be treated as being actually on the Statute Books, the court goes on to say:

"A State may not pass any Act which abridges or enlarges the responsibilities or duties of the Maritime Law. Rights in Admiralty cannot be affected by State enactment (Citing the Moses Taylor, 4 Wall., 411; The Hine v. Trevor, 4 Wall., 555; The Lottawanna, 21 Wall., 558; Butler v. Boston Steamship Co., 130 U. S., 527; Workmen v. N. Y., 179 U. S., 552)," and the court concludes, page 569:

"As we look at it, the provisions of the law Maritime as to the relation of a seaman to his employment are part of the substance and obligations thereof which cannot be modified by State Law, even through recourse to the saving clause of the Code."

The court also points out the reasons for the rule; namely that for torts of precisely the same char-

acter committed upon servants of precisely the same class, the master would be subject to as many varieties of responsibility and would be compelled to vary his defences as the laws pertaining to the incidents of service varied in the different ports reached by his vessel. In the case referred to there were eight different States bordering upon the waters where the "Saxona" plied. Also, the further reason that it would give to the suitor an option as to whether he would bring his suit in a State Court and have the State law applied or whether he would seek to enforce his right under the Maritime Law. This would, of course, be dependent upon which jurisdiction he considered the most favorable under the circumstances, and where the State Statute could be invoked to his benefit this would effectively deprive the Federal Courts of jurisdiction. The case in question was very fully argued and this honorable court affirmed the judgment of the Circuit Court of Appeals therein.

Surely, if the Employer's Liability Act of Ohio was a material modification of material characteristics of the Admiralty Law, it needs no further argument to show that a State Labor Law which makes the employer's duty "absolute," "positive" and "imperative" is a much more material modification.

This honorable court has further passed on an analogous question in the case of Union Fish Co. v. Ericson, 248 U. S., 308. That was a libel in Admiralty alleging that by an oral contract the petitioner proceeded to a port in Alaska, where he was to serve as master of a vessel and perform certain other duties. He claimed a wrongful discharge and sought to recover damages for breach of his con-

tract. The California Statute of Frauds was invoked as a defence, but the court said:

> "The Maritime Law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The parties must be presumed to have had in contemplation, the system of Maritime Law under which it was made."
>
> * * * * * * * *
>
> "If one State may declare such contracts void for one reason, another may do likewise for another. Thus the local law may deprive one of relief in a case brought in a Court of Admiralty of the United States upon a maritime contract and the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rules of the States."

The Statute of Frauds in principle went more to the remedy than to the right, but this court as it has always done, jealously guarded any encroachment upon the principles of the Maritime Law, as they have been uniformly enforced throughout the Union.

Congress has clearly recognized that this is so, for when they deemed it desirable to change the rights and obligations as between master and servant in Admiralty, by extending the provisions of the Federal Employers Liability Act to the benefit of seamen, it required an act of Congress to accomplish the result.

This court has further already recognized the wide difference between the principles of the admiralty law and the common law in tort actions.

In State Industrial Commission v. Nordenholt Corp. (supra) the court said:

> "When an *employee working on board a vessel* in navigable waters sustains personal injuries there, and seeks damages from the employer, *the applicable legal principles are very different from those which would control if he had been injured on the land while unloading the vessel. In the former situation the liability of the employer must be determined under the maritime law;* in the latter, no general maritime rule prescribes the liability, and the local law has always been applied."

Again in State Industrial Commission v. Nordenholt (supra) this court again emphasized its former determination on this question by quoting the language of the Chelentis case (supra) and Southern Pacific Co. v. Jensen (supra) holding that the attempt to change the measure of recovery was such a "substitution as would *distinctly and definitely change or add to the settled maritime law.*" Certainly here the "substitution" is even more radical in character, for with all due respect to the conclusions of the learned Court of Appeals of the State of New York, that the Labor Law does not make the employer an insurer, nevertheless as applied here and in the cited cases, it is hard to conceive how it can be less than that.

Therefore, when the Supreme Court of the State of New York substitutes for the Admiralty Rule, the measure provided by the State Labor Law, a most serious modification of characteristic features of the Admiralty Law has resulted and the consti-

tutional reservation of exclusive jurisdiction in matters of Admiralty and Maritime Law has been invaded.

POINT III.

The trial court would have been compelled to dismiss the complaint at the end of the plaintiff's case, and again at the end of the whole case, but for the application of Section 18 of the Labor Law.

The burden of proving his case was, as it always has been, at Common Law and in Admiralty, upon the plaintiff, to show negligence on the part of the defendant. A most careful examination of the record shows no negligence proven under the rules of the Maritime Law. By what conceivable process of reasoning can it be said that the master was negligent, when Dahl and his fellow worker picked up, examined and pronounced suitable for the purpose, the very plank that broke.

Humanitarian arguments in cases of this character should be made to Congress and not to the courts who are established to enforce the law as it exists. Such arguments will (judging from the respondent's brief in opposition to the petition for writ of certiorari), be urged here but it is merely an attempt to foster judicial legislation—a doctrine so often condemned by the United States Supreme Court.

The fellow servant doctrine, the rule as to proximate cause, the fellow servant rule and the fundamental principle as to the plaintiff's burden of proving the defendant's negligence are all so firmly engrafted into the admiralty and common law that

it takes legislative action to make such change. The various employers' liability acts, labor laws, Seaman's Act and Workmen's Compensation Acts are evidence of this. This Honorable Court has frequently pointed out that the field which the defendant in error seeks to have invaded by judicial legislation is open to Congress and it would be inconsistent not only, but a stealthy encroachment to thus permit the courts of the State of New York, to alter the Maritime Law in the respects here urged and thus accomplish the very thing which this court has said the constitution meant to prohibit.

The argument as to the so-called "growth of the common law" and its contemporaneous adoption by the admiralty is therefore false reasoning, for so far as the common law is concerned that growth has been evidenced only by legislation in every case as has heretofore been pointed out.

It is true that in this case, as in every negligence action, the court charged the jury as to the general principles governing such actions, such as the burden of proof and the generally accepted rules of negligence and contributory negligence; but in view of the great length to which the court went in its charge on the question of the Labor Law, it seems *reductio ad absurdum* to even contend that there was any other question of negligence in the case than the one provided by the application of the State Labor Law, which made the employer's duty "absolute." The error permeated the whole case from the time of the motion to amend the complaint to the conclusion of the court's charge and effectively deprived the plaintiff-in-error of his right to a trial under the principles of the Admiralty Law. In

short, when we consider all of these circumstances, the conclusion is irresistible that the charge of the court amounted to little more than the direction of a verdict under the State Labor Law and the consequent substitution of that law for the Maritime Law which this court has uniformly held was the proper measure of the rights and liabilities of the parties.

Conclusion.

Under the circumstances of this case therefore, and considering the fact that there are hundreds of cases pending in the various State Courts involving the identical principle here before the court, it is respectfully submitted that the judgment entered in the Supreme Court of the State of New York should be reversed and the New York State Labor Law held not applicable to Admiralty cases tried in the State Courts.

The plaintiff-in-error believes that the writ of error herein was properly allowed, but, as has already been stated, out of abundance of caution a petition for Writ of Certiorari has been presented and is now before this honorable court.

The question is of such vital importance and so clearly raised on the record that, it is respectfully submitted, if the court is of the opinion that the remedy should have been by Writ of Certiorari rather than by Writ of Error then the former writ should be allowed and the judgment of the Supreme Court of the State of New York reversed thereunder in accordance with the practice of this court.

Respectfully submitted,

A. GEORGE MAUL,
Counsel for Plaintiff-in-Error.

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Supreme Court of the United States

October Term, 1923

ROBINS DRY DOCK & REPAIR COMPANY,
Petitioner,

against

LARS DAHL,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RALPH G. BARCLAY,
Attorney for Respondent.

p. 1

A. W. Stevens, Printer, 300 Washington Street, Brooklyn, N. Y.—Main 2300

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Facts

The petitioner is a corporation organized under the laws of the State of New York, and engaged in business in New York City, Borough of Brooklyn, and maintains a place of business on the water front, including dry docks, and docks at which vessels under repair are moored. At this time it was engaged in the repair of a ship which was moored at its dock, and lying in navigable water.

A part of the repairs being made were to the engine and the accident which was the subject of this action happened in the course of lowering a heavy valve into the engine room. The valve was hung on tackle a few feet above the floor (composed of iron grating), of a gallery surrounding the engine room, and about thirty feet from the floor of the engine room itself. A portion of the grating flooring of the gallery, about 10 by 3 feet, directly beneath the suspended valve, had been taken up and was covered with boards.

The work of lowering the valve was being done by a gang of three or four workmen, among whom was the respondent, a mechanic's helper, under the supervision of one Kilbride, a rigger foreman.

It was necessary to have a plank to lay across this opening, which should be strong enough for the men to work upon, and Kilbride the foreman sent all of the men, including the respondent, to search upon the ship for a suitable plank, saying, "Look around and you will find some kind of a plank." The men went on this work, and some returned with unsuitable pieces. Respondent and one Kenny searching together, found a plank about 14 feet long, 6 to 10 inches wide and about 2 inches thick. Kenny said, "We will take it to the rigger (Kilbride) and see if it is all right." They brought it to Kilbride and asked him if it was all right, and he looked at it, and said, "Yes" and then directed them to lay it across the opening (124, 171).

They did so, and Kilbride stepped upon the plank, and was engaged in putting a sling upon the valve hanging above, and the respondent stepped upon the plank to assist him, when the plank suddenly broke in two, and he fell through the opening to the engine room below sustaining severe injuries. Kilbride saved himself by seizing the loose end of a rope.

The plank was apparently a new one (165), and after it broke, it was seen by Kenny to have a knot right near the edge, and on one side, which knot ran crosswise in the plank. This was mostly concealed in the wood, but *you could see about an inch of this knot that was cut off by the saw,* and then the knot ran across the plank. *The knot was noticeable at the edge for an inch or an inch and a half* (198, 199, 200).

The plank was not selected from others furnished by

the defendant, but was a single plank of unknown ownership lying on the deck. There was no testimony by the petitioner that a supply of proper material had been furnished. On the contrary, testimony was offered by the respondent that there were no other planks on the job, which testimony was excluded on objection by counsel (183, 202).

The evidence shows that there was a custom at this time and in this locality, and under the circumstances under which this plank was used, for the boss-rigger to test a new plank before using it for the first time by placing one end on some object and jumping on the plank and then turning the plank over and repeating the operation (305, 316, 317).

Some of the petitioner's witnesses, including Kilbride, admitted that this test was used, but confined it to times when the plank showed a defect (360, 373, 374, 376). Others said that if a knot appeared they would throw the plank out without a test (381). Kilbride testified that there were three knots across the plank, but that they did not show "not as he could see" (359).

The plank was not produced in Court.

POINT ONE

As the case was properly submitted to the jury under the maritime law, a writ of certiorari should be denied.

The Trial Court in a charge eminently fair to petitioner, submitted the case to the jury upon the broad question whether the petitioner was to be charged with negligence in its duty to its servant, the respondent, with respect to the use of this plank upon which he was required to work.

In the course of the charge it was said:

> "The law imposes upon a man the doing of the thing that the average reasonable man would do under similar circumstances and no more. * * * The law says that a man must comport himself in a reasonably careful manner, having in mind the general situation" (390).

The Court also called to the attention of the jury the evidence of defects in the plank used, and evidence of the custom to test a plank when it is to be used for such a purpose (410, 411).

The Court further read to the jury, Sec. 18 of the Labor Law of the State of New York (L. 1909, Ch. 36), as follows:

> "A person employing or directing another to perform labor of any kind, in the erection, repairing, altering or painting of a house, building or structure, shall not furnish or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances, which are unsafe, unsuitable, or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged."

And the Court stated, in reference to this law,

> "and the decisions hold that Sec. 18 of the Labor Law does not make the employer, as we term him the "master," in this case the defendant, an insurer of the scaffold—and the plank within the meaning of this law is a scaffold—it does not make the master an insurer of the safety of the scaffold under all conditions, it requires the scaffold to be so safe as to give proper protection to the workmen engaged in their duty. However careful the master, he is responsible unless the scaffold is in

> fact a proper one, proper to protect the workman in the performance of his work. No law of the State can modify or affect the right of workman who are operating under the maritime law. And it has been held that this Section 18 of the Labor Law does not modify or affect the law, but may be read in conjunction with the law. As I understand the law to be in determining in this case whether the defendant was negligent—for the plaintiff must still prove that the defendant was negligent—you must have in mind that there was in existence in this State a law which imposed upon the defendant the burden and the necessity of providing a scaffold that was proper for the workmen to work upon. And in this case in the light of that law, you must determine whether the defendant, knowing the law, as it was called upon to know it, acted negligently, and whether or not the plaintiff has proved by a fair preponderance of evidence that it acted negligently" (404 to 408).

It is therefore perfectly clear that the Trial Court sent this case to the jury, not as a statutory action founded upon this provision of the Labor Law of the State of New York, but as an action resting upon proven negligence upon the part of the petitioner, the defendant below, but allowed the jury in determining the question to take into consideration, together with the other circumstances of the case, the requirements of the local law. Among these circumstances also was the proven custom (local as far as appears, and not distinctly maritime), of testing the plank, before using it for such a purpose, and the evidence that reasonable inspection would have disclosed the defect in the plank.

Section 18 of the Labor Law of the State of New York (quoted *supra*) is a provision of law applying generally throughout the state to a person, "employing * * * another to perform labor of any kind, in the erection, repairing, altering and painting of a house, building or structure, * * *.

It is held not to create a new cause of action, as the law of the State knows as the Employer's Liability Act does, but is to be applied generally to actions between master and servant. *Maleeney* v. *Standard Shipbuilding Co.* (237 N. Y. 250); *Wilkes* v. *United Marine Contracting Corporation* (199 A. D., N. Y. 788.)

It is not directed especially to this industry of repairing ships, but a ship is held to be a "structure" within the meaning of the law. (*Madden* v. *Hughes,* 104 App. Div. (N. Y.) 101.) It is not an attempt to modify directly any maritime rule or law.

It was passed in the exercise of the police power of the State of New York to make more safe the conditions under which in modern industry, the citizens and inhabitants of the State are compelled to work.

It was a law designed to prevent accidents by requiring care in the erection of scaffolds, and other like appliances, and not designed to alter any established principle of liability. It does not as we understand alter any established principle of liability upon the part of the master. The most that can be said is that it extended the duty of the master to the safety of the appliance itself, as erected and used, whereas, *under some circumstances,* that is where the master had furnished proper materials at hand, the common law would ascribe the insufficiency of the erected scaffold to the negligence of fellow servants in the selection of proper material from that furnished, and in the work of erection.

Such a statute is of an entirely different character than the Workmen's Compensation Act, which was concerned only with establishing an exclusive system and schedule of payments for industrial casualties, and assessing them through the medium of insurance upon the industry and indirectly upon the public.

As to the effects of this section of the Labor Law upon the common law of the State of New York, it is said, in the *Maleeney* case (*supra*).

> "The principal modification of the common law is that the master is made liable even if the scaffold be defectively constructed through the negligence of fellow servants, *he, the master having furnished proper materials.*" (Italics ours.)

This is particularly required by that part of the statute which provides that such a person shall not "furnish or erect, or cause to be furnished or erected" an improper scaffold.

And in the *Wilkes* case (*supra*), the Appellate Division of this State said (page 793):

> "The duty of the master to furnish his servant with a safe place to work and with safe tools and appliances is as old as the common law itself. It is recognized in all courts, Federal and State, and in the Admiralty Law. This duty is so firmly fixed upon the master by the common law that he cannot delegate its performance to a servant and escape liability, if the servant, whatever his grade, neglects to properly perform the duty and injury results therefrom to a person to whom the master owed such duty. (*Crispin* v. *Babbitt*, 81 N. Y., 516; *Pantzer* v. *Tilly Foster Iron Mining Co.*, 91 *id.* 368; *Simone* v. *Kirk*, 173 *id.* 7.) Certainly there is nothing revolutionary in the requirement of Section 18. While it may broaden the liability of the master (*Stewart* v. *Ferguson*, 164 N. Y. 553; *Gombert* v. *McKay*, 201 N. Y. 27), the master's duty existed before the statute. While the statute itself may create a cause of action where its breach is the proximate cause of the injury (*Marino* v. *Lehmaier*, 173 N. Y. 530) the plaintiff in the case at bar is not asserting any such statutory cause of action. His case is based upon the common law liability of the defendant. In the

> *Marino* case the late Judge O'Brien, a jurist of recognized eminence and ability, said in his dissenting opinion (p. 544). The case of *Stewart* v. *Ferguson* (164 N. Y. 553) was one in which a person was injured by the fall of a scaffold on which he was at work. Section 18 of the Labor Law prohibited persons employing laborers to work upon a scaffold from furnishing unsafe, unsuitable or improper scaffolding. It was held in that case that the plaintiff could recover, but he could recover just as well before the statute upon proof that the scaffold was unsafe and made of unsuitable materials. That was not a case where the statute created a cause of action."

But in the case at bar there is no evidence that the defendant below furnished sufficient and proper planks, and proof that such planks were not furnished by it was upon the objection of the counsel for the defendant below, excluded (fol. 202). The testimony is that this was the only plank of suitable length and thickness to be found by a search, and it was found lying on the deck. The most favorable view from the standpoint of the master is that this single plank was furnished, or at least adopted and used. If so, it was not subjected to the usual test, and was defective, and the defect was discoverable by inspection.

It is plain that there was no foundation laid for any claim that the master had by the furnishing of sufficient proper materials discharged its entire duty, and that the insufficiency of the plank must be ascribed to want of care in selection. It is true that the evidence shows that other workmen also brought from various parts of the ship other pieces of timber, most of them not of the proper size, and these were rejected. So if we assume that the master should be credited as with furnishing several pieces of this material, it also appears that all of it was inadequate, and the plank used was proven defective.

In this respect the case differs from the case of *Maleeney* v. *Standard Ship Building Co.* (*supra*), but it is otherwise quite similar.

Under the common law of the State of New York, it would be a question of fact under the evidence, without recourse to the Labor Law, whether the master had performed its full duty. We assume that it would be the same in admiralty. So the practical effect of this provision of the Labor Law in this case is very slight and is obscure. It does not make the liability of the master "positive" or "absolute" in this case, for it was not so submitted to the jury. The plank was defective and broke, and this evidence would alone establish a *prima facie* case under the doctrine of *res ipsa loquitur,* we contend, both at common law and in admiralty. The case developed little in the way of defence, and the plank was not produced.

It seems that this is very pertinent upon the question whether a writ should be issued to review the judgment. It is clearly not a case dependent on proof of the Labor Law, and it is not a case where otherwise the recovery would be contrary to accepted principles of the common law or of maritime law.

The effect of a ruling by this Honorable Court that the Labor Law of the State of New York could not be considered in a case of a maritime tort, would be far reaching, and would enable this petitioner and others in like business to carry on this industry within the State of New York in large measure in defiance of this provision of law, and other similar provisions having for their sole aim the safety and well being of laborers. This particular statute has been in effect for about 15 years and, as was said in the *Wilkes* case (*supra*) has become a part of the common law.

Such a ruling would also create confusion in this very

industry part of which is carried on upon navigable water, and part upon the land.

The Learned Court in the *Maleeney* case (*supra*) said that it found no disagreement that the common law of the states has become the law of admiralty as it relates to master and servant. The Court was speaking of a situation like the one in this case. The local law is the natural source to draw upon in determining the measure of duty between master and servant. A tort is a wrong, a violation of duty, and it is almost impossible to define a violation of duty without consideration of local customs and laws. We do not believe that any system of law attempts to do so. The common law as administered in the State of New York considers local customs, local regulations and ordinances, as far as they do not conflict with state authority.

In this situation the local law should be applied because this private industry has not been the subject of direct Federal supervision, but the responsibility has been left to the State to regulate it as far as the relations of the master and servant are concerned.

The recent cases in this Court cited in petitioner's brief are all, or nearly all cited in the opinions in the *Maleeney* and *Wilkes* cases, the opinions in which are added to this brief for the convenience of this Court. We do not think that those cases are decisive in this case. They referred to the right of the State of New York to apply the compensation law of this State to maritime torts under the jurisdiction of the admiralty courts. It was the radical nature of such act, legislating out of existence a recovery upon principles of liability known to the Courts and substituting an exclusive recovery founded on economic theories that was the base of those decisions. We think this Honorable Court has not intimated that there is to be any change in the process by

which the maritime law has absorbed and applied common law principles and local law in cases of this character. Thus the admiralty law becomes responsive to public opinion as enacted into local statute, and being thus responsive and flexible serves its purpose, otherwise, in the absence of direct federal statute it would fall into disrepute. The petitioner's apparent conception of the maritime law of this case is that it is the common law of past decades when the defences of "detail of the work," "fellow servant" and "assumption of risk," were at their height, and that the maritime law of today is identical, as far as it limited the master's duties, with the common law before the enactment of this and other remedial statutes, and that at such favorable moment (for employers) it became petrified and impervious to the solving influence of state statute reflecting a more liberal policy of the state and locality.

We do not deny that in admiralty as at common law the master is not liable for the negligence of a fellow servant, except in a limited way, for maintenance and cure in the case of sailors. We have endeavored to show that under the circumstances of this case the negligence was that of the master, and that the failure to furnish a reasonably proper plank, whether called a place of work, an appliance, or a "scaffold" cannot be laid at the door of the servant or a fellow servant, and that it would not be so considered in admiralty.

It seems however that if the admiralty law adopted from the common law the principal that we speak of as the "fellow servant" principle, and ever applied it to a case where the master had furnished material only, and had taken no care for the safety of the erected scaffold, it should as readily adopt later statutory modifications of what was believed to be a harsh rule.

We are inclined to believe that the rule never obtained in admiralty to the extent that it did under some decisions in the common law courts of this state.

In *Atlantic Stevedoring Company* v. *Imbrovek* (234 U. S. 52), the stevedore was held liable as for the safety of the working place, when the cross beams of a hatch were caught by an ascending draft and dropped below, injuring an employee. The negligence of the master consisted of a failure to either remove the cross beams, or to fasten them with pins that were furnished. This negligence was not ascribed to fellow workmen as a detail of the work, but the responsibility was placed upon the master for its failure to furnish a safe working place.

In *Carter* v. *Brown,* 212 Fed. 393 (5th Circuit), the claimant was injured by the falling of sacks of sugar upon the deck of a river boat. The negligence consisted of the failure of officers to see that the sugar was properly piled, *i. e.,* not piled so high, or else supported from falling. This was evidently held to be a failure of the master to furnish a safe place to work and not ascribed to the failure of fellow employees to properly pile and secure the sugar.

We are unable to see that this statute in question applied to a case under the maritime law, "contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." (*Southern Pacific* v. *Jensen,* 244 U. S., 205, 216.)

We beg to adopt as part of our argument the opinions of the State Courts in the cases of *Maleeney* v. *Standard Ship Building Co.,* and *Wilkes* v. *United Marine Con-*

tracting Corporation, which we have annexed hereto, and thus avoid repetition as far as possible.

A case that seems to us in point is the case of *Frese* v. *Chicago, Burlington and Quincy Railroad Co.,* decided by this Court, October 15th, 1923 (adv. Op. Nov. 1st, 1923). That was a case under the Federal Employer's Liability Act, for damages for the death of an engineer, and it appeared that the deceased had violated a state statute of Missouri, which required him to bring his train to a stop before crossing the tracks of another railroad, and to surely ascertain that no danger existed. The violation of this state statute prevented a recovery, and this Court held that such statute was applicable in determining that question of negligence.

POINT TWO

The Petition does not show that certiorari is the proper remedy in this case.

The respondent respectfully submits that the writ should be denied.

Dated, New York, April , 1924.

Respectfully submitted,

RALPH G. BARCLAY,
Attorney for Respondent.

PETER MALEENEY, *Respondent*, v. STANDARD SHIPBUILDING CORPORATION, *Appellant*.

CRANE, *J.*:

The Standard Shipbuilding Corporation, the defendant in this case, is a domestic corporation doing business in Richmond county, city and state of New York. The plaintiff was in the employ of the defendant working as a sheet iron helper. On the 6th day of October, 1921, he with other laborers was engaged in making certain repairs upon the ship *Buckeye State*, lying at the shipyards of the defendant at Rosebank, Staten Island. The particular work that he was engaged in doing was the repair of a metal ventilating shaft which was erected over the engine room in the hold of the ship and extended to the deck. The ventilator had been removed and was being replaced at the time of the accident. A scaffold had been erected by a crew of riggers in defendant's employ upon which the plaintiff was obliged to work. A plank of this scaffold broke and the plaintiff fell about twenty feet to the engine room below sustaining injuries for which he brought this action.

The court, in charging the jury, referred to the New York State Labor Law (Laws of 1921, chapter 50 [Cons. Laws, chap. 31]), which provides:

"Sec. 240. Safe scaffolding required for use of employees.

"1. A person employing or directing another to perform labor of any kind in the erection, repairing, altering, painting, cleaning or painting of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other mechanical contrivances which shall be so constructed, placed and operated as to give proper protection to a person so employed or directed."

Regarding this law the judge in his charge said:

"I said a moment ago something about the failure to observe a duty being negligence. There is a law in our state known as the Labor Law. Under section 18 of that law you will have to consider whether the defendant has

observed the duty which that law casts upon it. Section 18 of the Labor Law prohibits an employer from furnishing to his employees a scaffold unsafe, unsuitable or improper and which is not so constructed as to give proper protection to the life and limb of the person employed to work thereon. Under this section there is a positive prohibition laid upon the master without exception on account of his negligence or the carelessness of his servants.

"If you find that the statute has been violated, and that the violation caused the accident, you may consider the statute with all the other facts proved in determining whether the defendant was guilty of negligence."

The charge was perhaps more favorable to the defendant than it was entitled to under the decisions of this court. We have held that there was an absolute duty under this Labor Law to furnish a safe scaffold, and that the master was liable as for negligence if the scaffold proved to be unsafe and the servant were injured The principal modification of the common law is that the master is made liable even if the scaffold be defectively constructed through the negligence of fellow-servants, he, the master, having furnished proper material. (*Stewart* v. *Ferguson*, 164 N. Y. 553; *Caddy* v. *Interborough Rapid Transit Co.*, 195 N. Y. 415.)

The defendant, of course, does not complain upon appeal that this charge was more favorable to it than it should have been. It claims, however, that the Labor Law can have no application to the case whatever as the tort is a maritime tort, governed by the admiralty law. By section 9 of the Judiciary Act of 1789, which has been continued by the Judicial Code, sections 24 and 256, the District Courts are given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * * saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

For an accident such as happened to the plaintiff in this case he could bring his action in admiralty or in the courts of this state.

It is the common-law duty of a master to furnish his servant with a proper place to work and reasonably safe

appliances; for his neglect of this duty he is liable for the resultant injury. (*Crispin* v. *Babbitt*, 81 N. Y. 516; *Pantzar* v. *Tilly Foster Iron Mining Co.*, 99 N. Y. 368.) This is also the law in admiralty, as applicable to those other than seamen. (*Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52.)

Whether there be an admiralty law of master and servant separate and distinct from the common law, as it is known and applied by the states, need not be discussed, as it is neither important nor pertinent.

The fact is that admiralty does apply the common law of master and servant as it has been expounded by the common-law courts.

In *Leathers* v. *Blessing* (105 U. S. 626, 630) it was said: "Nor is the term 'tort,' when used in reference to admiralty jurisdiction, confined to wrongs or injuries committed by direct force, but it includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case."

And Justice HOLMES in *Knickerbocker Ice Co.* v. *Stewart* (253 U. S. 149, 167) says: "But somehow or other the ordinary common-law rules of liability as between master and servant have come to be applied to a considerable extent in the admiralty. If my explanation, that the source is the common law of the several states, is not accepted, I can only say, I do not know how, unless by the fiat of the judges."

As I read the cases I find no disagreement with this statement of Justice HOLMES, that the common law of the states has become the law of admiralty as it relates to master and servant. The only disagreement which I find is in determining what that common law is, or else in its application to situations strictly maritime. (*Workman* v. *N. Y. City, Mayor, etc.*, 179 U. S. 552; *Baltimore & Ohio Railroad Co.* v. *Baugh*, 149 U. S. 368; *Detroit* v. *Osborne*, 135 U. S. 492.)

We start, therefore, in our discussion with the concession that for the failure of the master to provide the servant with a reasonably safe place to work and with proper appliances, an action may be brought either in the state courts or in the United States District Courts.

The law to be applied in either tribunal will be the common law; in admiralty it may be called the maritime law.

The question arises whether or not this common-law rule of masters' liability can in any way be modified by state statutes. Can a state statute, for instance, create a presumption of negligence from the happening of an accident, which I take it, would be simply modifying the rules of evidence, or shifting the burden of proof? Can it go a step further, as it evidently has done in our Labor Law, and say that employers do not fulfill their complete duty to their servants by simply furnishing them with sufficient material to build a scaffold, but that they must see to it that the scaffold when built is safe. Broadly speaking, this wipes out the fellow-servant rule as to such a construction. Are these modifications proper and enforceable in the state courts when the accident is a maritime tort? We must remember, in this discussion, that we are dealing with a domestic corporation, and with a servant working for that corporation in the state of New York.

That the right of a common-law remedy which has been saved to suitors is not limited to either the substantive or remedial law, as it was in 1789, has heretofore been decided. Referring to the case of *Steamboat Company* v. *Chase* (16 Wall. 522) Mr. Justice BROWN in *Knapp, Stout & Co.* v. *McCaffrey* (177 U. S. 638, 646) said: "Defendant took the position that the saving clause must be limited to such causes of action as were known to the common law at that time of the passage of the judiciary act, and as the common law gave no remedy for negligence resulting in death, an action subsequently given by the statute was not a common-law remedy. The contention was held to be unsound."

In *The Hamilton* (207 U. S. 398, 404) we find this stated as the opinion of the Supreme Court: "The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, 'saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it,' Rev. Stats. Sec. 563, cl. 8, leaves open the common-law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted. * * * And as the state courts in their

decisions would follow their own notions about the law and might change them from time to time, it would be strange if the State might not make changes by its other mouthpiece, the legislature."

That the common law applicable to martime torts may be modified by state statutes to a certain extent and within reasonable limitations, seems to be unquestioned. The extent of the modification, however, has been much questioned of late, and has given rise to much uncertainty.

We have, upon the one hand, the *Jensen* case (*Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 215) which holds that a state statute wiping out the master's common-law liability for injuries to his servant resulting from negligence, and substituting therefor the Workmen's Compensation Law, passed the limit of legality and was unconstitutional.

This case settled the state's power over maritime torts so far as the Workmen's Compensation Law was concerned, but made no attempt to fix the limits of that power. In fact, Mr. Justice McReynolds, writing the opinion, so intimates, for he frankly states: "In view of these constitutional provisions and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute, *The Lottawanna*, 21 Wall. 558, 579, 580; *The J. E. Rumbell*, 148 U. S. 1; pilotage fees fixed, *Cooley* v. *Board of Wardens*, 12 How. 299; *Ex parte McNeil*, 13 Wall, 236, 242; and the right given to recover in death cases, *The Hamilton*, 207 U. S. 398; *La Bourgogne*, 210 U. S. 95, 138. See *The City of Norwalk*, 55 Fed. Rep. 98, 106. Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings *in rem* according to the course in admiralty, *The Moses Taylor*, 4 Wall. 411; *Steamboat Co.* v. *Chase*, 16 Wall. 522, 534; *The Glide*, 167 U. S. 606; nor create liens for materials used in repairing a foreign ship, *The Roanoke*, 189 U. S. 185. See *Workman* v. *New York City*,

179 U. S. 552. And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself." (This was followed by *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149.)

On the other hand, in the *Garcia* case (*Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 240) we find modifications of the common law by state statute adopted and applied in admiralty. While the previous cases of *Steamboat Co.* v. *Chase* (*supra*) and *Sherlock* v. *Alling* (93 U. S. 99) had sustained recoveries in a state court for negligence causing death in a maritime tort, the *Garcia* case determined for the first time that the same modification of the common law would be followed in admiralty. In the opinion we find it stated: "How far this rule of nonliability adopted and enforced by our admiralty courts in the absence of an applicable statute may be modified, changed or supplemented by state legislation has been the subject of consideration here but no complete solution of the question has been announced."

Referring to the *Jensen* and the *Stewart* cases the court continues: "We have recently discussed the theory under which the general maritime law became a part of our national law, and pointed out the inability of the states to change its general features so as to defeat uniformity—but the power of a state to make some modifications or supplements was affirmed."

At common law there was no recovery for death due to negligence. State statutes have modified this common-law rule by giving a cause of action to the representatives of the deceased. This, in my opinion, is more than a mere change in remedy or a method of procedure. It is the giving of a substantial right. The reason it is recognized in admiralty is because it in no way interferes with the general scheme and scope of the admiralty law or the purposes which require that law to be uniform in

all jurisdictions. It will not do to call these death statutes mere modifications of remedy as they are not such in fact. This is evidenced by the rule in the *Garcia* case that the time limited within which to bring the death action is a part of the right, and not the remedy and will be given force and effect in the admiralty courts. We find it there stated: "Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right." (Quoting from *The Harrisbury,* 119 U. S. 214.)

Again as evidencing that the death statutes deal with something more than the remedy, we find the admiralty courts following the state courts as to contributory negligence in such cases, and holding contrary to their customary rule, that as contributory negligence bars recovery in a state court, in an action to recover for death from negligence, so likewise will contributory negligence bar recovery in the admiralty court. (*City of Norwalk,* 55 Fed. Rep. 98, 102.)

Turning to this case, the *City of Norwalk,* cited with approval both in the *Jensen* case and the *Garcia* case, we find the limitation upon the state's legislative activity well expressed as follows: "This view, however, does not exclude state legislation upon matters of merely local concern, which can be much better cared for under state authority, and which have always been thus cared for; nor does it exclude general legislation by the states, applicable alike on land and water, in their exercise of the police power for the preservation of life and health, though incidentally affecting maritime affairs; provided that such legislation does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations. The long-established doctrine in the Supreme Court has been that in this field of 'border legislation,' state laws are valid until Congress interposes, and thereby excludes further state legislation."

Thus our Labor Law was not made especially applicable to ships or to the local waters, but applies to all

employers furnishing scaffolds on buildings or structures within state territory. The defendant is a domestic corporation subject to the laws of the state of New York. The plaintiff was its servant and the accident happened here.

Can it not be claimed with much reason that this law passed in the interests of the laboring man for the erection of safe scaffolding was part of the police power of the state for the preservation of the life and health of its citizens, and was as applicable, therefore, to work upon a ship in the harbor, performed by resident master and servant, as upon any other structure? I think so, and for this reason believe that the Labor Law referred to has modified and supplemented the common law of master and servant within the limits permitted by the United States Constitution, and that it is applicable to such a marine tort as we have in this case.

Whether the admiralty courts will enforce this Labor Law, we, of course, cannot determine. Our power, however, to give force and effect to our own statutes, is not entirely dependent upon what they may do, (*Steamboat Co.* v. *Chase, supra; Sherlock* v. *Alling, supra.*) (See in point *Schwede* v. *Zenith Steamship Co.,* 216 Fed. Rep. 566; 244 U. S. 646.) Schwede was a seaman.

Another question has arisen in this case which, because of the authorities in the United States Supreme Court has proved quite troublesome to the state courts. It is the question of contributory negligence as a bar to recovery. According to the common law contributory negligence of a plaintiff bars recovery; in admiralty it may merely reduce or apportion the damage. The court, in charging the jury in this case, said: "Here is a provision of the maritime law which is peculiar, and I will ask you to pay strict attention while I am charging you on it. Contributory negligence of the injured party may not defeat a recovery entirely. It goes to the cause of the injury. It may be sufficient to defeat the recovery. It may require a reduction or an apportionment of the damages.

"It is for you to say whether the acts of the plaintiff were such as to relieve the defendant from liability or partial liability; and if partial liability, to what extent.

You will apply that rule. That means that you can apportion the negligence, if you find there is negligence on both parties; that you can apportion the negligence between the parties, and arrive at your verdict on an apportionment basis, if you so determine."

This is the rule applicable in the admiralty courts as decided in *The Max Morris* (137 U. S. 1, 15).

"We think," said the court in that case, "this rule is applicable to all like cases of marine tort founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery."

Note that the rule is applied to cases prosecuted in admiralty. When a collision case was prosecuted in the state court a different rule was applied. (*Belden* v. *Chase,* 150 U. S. 674, 691.) Two vessels collided in the Hudson river. An action was brought in the New York State Supreme Court to recover for the injuries sustained by one of the vessels. It was claimed that the plaintiff's ship was guilty of negligence, contributing to the accident. The common-law rule that contributory negligence bars recovery was held to be applicable. The court said:

"The doctrine in admiralty of an equal division of damages in the case of a collision between two vessels when both are in fault contributing to the collision, has long prevailed in England and this country. *The Max Morris,* 137 U. S. 1. But at common law the general rule is that if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused. *Atlee* v. *Packet Co.,* 21 Wall. 389.

"In order to maintain his action, the plaintiff was obliged to establish the negligence of the defendant, and that such negligence was the sole cause of the injury, or, in other words, he could not recover, though defendant were negligent, if it appeared that his own negligence directly contributed to the result complained of."

It has been, therefore, distinctly held that in admiralty the comparative negligence rule applies, while in the state courts the common-law rule of contributory negligence bars recovery. The cases of *Johnson & Co.* v. *Johansen* (86 Fed. Rep. 886); *The Lackawanna* (151 Fed. Rep. 499; *Carter* v. *Brown* (212 Fed. Rep. 393), were actions in admiralty.

The Circuit Court of Appeals for the Second Circuit in *Port of New York Stevedoring Corporation* v. *Castagna* (280 Fed. Rep. 618) has applied the rule laid down in the *Max Morris* case (*supra*) to an action at law. We feel that we should follow the rule of the Supreme Court of the United States in *Belden* v. *Chase,* until that court modifies or limits the authority. We do not find that it has ever been overruled. It was applied by this court in *N. Y. Harbor Tow-Boat Co.* v. *N. Y., L. E. & W. R. R. Co.* (148 N. Y. 574).

The Appellate Division also in *Kennedy* v. *Cunard Steamship Company, Limited* (197 App. Div. 459) held that the rules relating to contributory negligence must be determined by the maritime law and not by the common law. This followed, so its opinion states, the determination in *Chelentis* v. *Luckenbach Steamship Company, Inc.* (247 U. S. 372). The distinction, however, the Appellate Division failed to notice, between seamen and the ordinary land servant temporarily working on a ship, such as a stevedore, painter or mechanic. The law of the *Chelentis* case, *The Osceola* (189 U. S. 158) and *Carlisle Packing Co.* v. *Sandanger* (259 U. S. 255) was applied to the peculiar relationship existing between the members of the crew of a vessel and the owner.

The nature of a seaman's contract is such that unless the vessel be unseaworthy or there be a failure to supply and keep in order the proper appliances appurtenant to a ship, a seaman for an injury received is only entitled to his maintenance and cure and to his wages, at least so long as the voyage is continued. For disobedience to orders he may be locked up or put in irons. These rules of maritime law, applicable to seamen and members of

the crew, and so restricted by these decisions, have no application to shore servants working on docked ships. The instances where such servants, like stevedores, have recovered damages for injuries received through negligence while working on ships are so numerous both in admiralty and in the state courts that citations are unnecessary.

The common-law remedy, which as above stated, was saved to suitors by the Federal Judicial Act, included this rule that contributory negligence barred recovery in an action by a servant against his master. We are inclined to follow this common-law rule not only because the United States Supreme Court has said that it is the law to be applied in state courts, but also because a contrary rule would work the following absurdity. It has been held that in actions to recover damages for death caused by negligence, arising out of maritime torts, contributory negligence will bar recovery. (*City of Norwalk, supra; Quinette* v. *Bisso,* 136 Fed. Rep. 825, 838; *Groonstad* v. *Robins D. D. & R. Co.,* 236 N. Y. 52.) If, therefore, the comparative negligence rule of contributory negligence were to apply to actions in state courts for a maritime tort, we would have this situation. In an action brought against an employer by an employee for negligence arising out of a maritime tort, the comparative negligence rule would apply; if the employee were killed, his contributing negligence would absolutely bar recovery by his representatives.

No doubt the inconsistency may arise in the admiralty courts. This merely illustrates that if the law of contributing negligence as applied by the state courts and the admiralty courts differ, it is one of those differences which is apt to arise in all litigation where resort may be had to different tribunals. Law and its procedure is not an exact science. Given the same facts and circumstances, the same result cannot be guaranteed in law as it usually can be in natural science.

The inequalities which result to litigants at times in the application of different laws in different jurisdictions is not more serious than those differences in result which are due to human agencies, such as judges and jurors in attempting to apply a uniform law.

Believing, therefore, that the common-law rule of contributory negligence should have been charged in this case, we are obliged to reverse the judgments of the courts below and grant a new trial.

HISCOCK, *Ch. J.*, HOGAN, CARDOZO and ANDREWS, *JJ.*, concur; POUND and MCLAUGHLIN, *JJ.*, dissent.

Judgments reversed, etc.

JOHN WILKS, *Appellant*, v. UNITED MARINE CONTRACTING CORPORATION, *Respondent*.

Second Department, February 3, 1922.

KELLY, *J.*:

The plaintiff, a painter, residing in the city of New York, commenced this action against his employer, the defendant contracting corporation, organized under the laws of the State of New York, to recover damages for personal injuries caused by the breaking of a scaffold furnished by defendant upon which plaintiff and another painter were working. The accident occurred between decks on a steamship moored to a dock in the city of New York. Through the collapse of the scaffold plaintiff fell to the flooring or deck, a distance of some twenty feet, and was injured. There was evidence that the "riggers" in erecting the scaffold used a defective timber which they found on the floor of the hold, and that this timber broke under the weight of the plaintiff and his companion. On the other hand, the defendant contended that the timber had been tested and was safe.

The complaint stated a common-law cause of action against the defendant, alleging that it was negligent in providing an unsafe place for plaintiff and in furnishing him with unsafe and insufficient appliances by reason of which negligence he was injured without fault on his part.

The learned trial justice submitted the case to the jury in a charge in which he told them that plaintiff must prove negligence on the part of the defendant and absence of contributory negligence. He told the jury that the law imposed a duty on the defendant to furnish its

employee with a safe place in which to work. The plaintiff claimed that the scaffold in question was erected by a gang of "riggers" employed by defendant for that purpose, and the learned trial justice submitted to the jury the question whether these "riggers" were fellow-servants of the defendant, and told them that if they were fellow-servants and the accident happened through their fault and was not in any way due to the fault of the defendant, the plaintiff could not recover. The plaintiff excepted to the application of the fellow-servant rule. The trial justice also charged the jury at defendant's request, that if the defendant furnished a proper and sufficient amount of material for scaffolding which was available on the day in question to the co-servants of the plaintiff who were engaged in the construction of the scaffold, and said servants instead of availing themselves of such material so offered for their use chose to take a board or plank which was a part of the ship and use that in the construction of the scaffold, in such case the negligence was that of a fellow-servant for which the defendant was not liable. To this instruction plaintiff also excepted. The learned trial justice also refused the plaintiff's requests that he should instruct the jury that the plaintiff was entitled to the protection of the safety provisions in section 18 of the Labor Law of the State of New York,* which prohibit an employer from furnishing to his employees scaffolding which is unsafe, unsuitable or improper or which is not so constructed as to give proper protection to the life and limb of a person employed to work thereon. The plaintiff excepted to such refusal to charge.

The jury found a verdict for the defendant, and the appeal brings up the question, hitherto undecided as far as I can ascertain, whether the safety provisions of the statute referred to are available to a plaintiff in an action based on the common-law remedy saved to suitors in maritime cases where the common law is competent to give it.

In the case of *Atlantic Transport Co.* v. *Imbrook* (234 U. S. 52) the defendant in error was one of a gang of stevedores stowing cargo in a vessel. He was injured

*Now Labor Law (Consol. Laws, chap. 31; Laws of 1921, chap. 50), § 240, subds. 1, 2.—[REP.]

through the negligence of his employer, the plaintiff in error, which had the contract to load the vessel. He filed a libel in admiralty against the shipowner and also against his employer. The District Court dismissed the libel as to the shipowner, but held that the libellant could recover in admiralty against his employer for the reason that the tort complained of was maritime in character. (*Imbrovek* v. *Hamburg-American Steam Packet Co.*, 190 Fed. Rep. 229.) The district judge refused to follow the decision in *Campbell* v. *Hackfeld & Co.* (C. C. A. 9th Circuit, 125 Fed. Rep. 696), where it was held that admiralty had no jurisdiction in an action between the employee and the contracting stevedore, and held that the jurisdiction of admiralty depended upon the locality of the tort. The decision of the District Court was affirmed by the Circuit Court of Appeals, 4th Circuit (193 Fed. Rep. 1019), and in the Supreme Court of the United States (234 U. S. 52). Mr. Justice HUGHES, writing for the Supreme Court, said that while the precise scope of admiralty jurisdiction is not a matter of " 'obvious principle or of very accurate history,' " and "Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature and hence the District Court, from any point of view, had jurisdiction. * * * The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty." The law as declared in the *Imbrovek* case was later applied in *Southern Pacific Co.* v. *Jensen* (244 U. S. 205), where Jensen, a stevedore, was killed while engaged in loading a steamer belonging to his employer, the plaintiff in error. His widow and children obtained an award under the Workmen's Compensation Law of the State of New York (Consol. Laws, chap. 67) and the award had been sustained by the Court of Appeals. (*Matter of*

Jensen v. *Southern Pacific Co.*, 215 N. Y. 514.) But the Federal Supreme Court held that the Workmen's Compensation Law of the State of New York conflicted with the general maritime law to such an extent as to render it invalid. The court held that the Compensation Law worked material prejudice to the characteristic features of the general maritime law and interfered with the proper harmony and uniformity of that law in its international and interstate relations. The court said: "Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Courts, 'saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.' The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction." This doctrine was reaffirmed in *Knickerbocker Ice Co.* v. *Stewart* (253 U. S. 149). And the Court of Appeals following these decisions has decided that the Workmen's Compensation Law is inapplicable in the case of maritime contracts. (*Matter of Newham* v. *Chile Exploration Co.*, 232 N. Y. 37; *Matter of Doey* v. *Howland Co.*, 234 id. 30; *Matter of Anderson* v. *Johnson Lighterage Co.*, Id. 539; *Matter of Keator* v. *Rock Plaster Mfg. Co.*, Id. 540.)

In *Kennedy* v. *Cunard Steamship Co., Ltd.* (197 App. Div. 459) this court, in the First Department, discussed the saving clause in the Judiciary Act of 1789, section 9, as continued in the Judicial Code, sections 24 and 256, and cited numerous decisions in the Federal Supreme Court relating to the subject, and said: "These cases settle the law to be that actions *in rem*, whether arising under the general maritime law or to enforce liens given by the United States or local State statutes, must be prosecuted in admiralty in the United States courts, while actions *in personam*, arising out of maritime contracts or torts, may be brought in admiralty or on the law side of the United States court or in a State court having an appropriate common-law remedy. It is the right sanctioned by the maritime law that may be enforced by any court having jurisdiction of the parties

or the *res* by the common-law remedies appropriate thereto. This clause gives a right of election of a forum for the enforcement of the maritime right or to remedy the maritime wrong and thereby allows election of the procedure, whereby the matter may be decided. But the complaining party has no right of election to determine whether the defendant's liability shall be measured by common-law standards rather than by those of the maritime law. (*Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 383). The maritime law as fixed and determined by the acts of Congress and the general maritime law as accepted by the Federal courts constitute part of the national law applicable to matters within the admiralty and maritime jurisdiction. The rights and liabilities arising out of maritime contracts or maritime torts, as recognized and declared by the maritime law, cannot be changed by State statute, nor by substitution of a common-law right or liability.

"The insant case is an action for damage for personal injuries, for which there exists in this State a common-law remedy. Therefore, the action may be brought in our Supreme Court, the rules of practice, pleading and evidence of our courts apply, and the cause will be tried in conformity therewith; but the rules relating to contributory negligence, acts of fellow-servants, and the measure of recovery must be determined by the maritime law and not by the common law."

But I have grave doubt whether the safety requirements in section 18 of the New York Labor Law come within the ban of these decisions. The plaintiff in this case is not asserting a claim against the ship or the shipowner. He is suing his immediate employer, a domestic contracting corporation, for damages occasioned by its failure to supply him with a safe scaffold. We are not considering any such novel, unusual statutory liability as that imposed by the Workmen's Compensation Law. We are not considering any change in the liability of the master under the employers' liability provisions of the State Labor Law. The question in the case at bar relates solely to the Labor Law, section 18, which enlarged the duty of the master or employer and extended it to responsibility for the safety of the scaffold itself and thus

to want of care in the details of its construction. (*Stewart* v. *Ferguson*, 164 N. Y. 553, 555.) Compliance with the provisions of the Employers' Liability Act (Labor Law, §§ 200-204; now Employers' Liability Law [Consol. Laws, chap. 74; Laws of 1921, chap. 121] §§ 1-7) is not essential to an action for injuries based upon a violation of the provisions of section 18. (*Williams* v. *Roblin*, 94 App. Div. 177.) It seems to me the benefit secured to the employee by section 18 is part and parcel of the common-law remedy. The duty of the master to furnish his servant with a safe place to work and with safe tools and appliances is as old as the common law itself. It is recognized in all courts, Federal and State, and in the Admiralty Law. This duty is so firmly fixed upon the master by the common law that he cannot delegate its performance to a servant and escape liability, if the servant, whatever be his grade, neglects to properly perform the duty and injury results therefrom to a person to whom the master owed such a duty. (*Crispin* v. *Babbitt*, 81 N. Y. 516; *Pantzor* v. *Tilly Foster Iron Mining Co.*, 99 id. 360; *Simone* v. *Kirk*, 173 id. 7.) Certainly there is nothing revolutionary in the requirement of section 18. While it may broaden the liability of the master (*Stewart* v. *Ferguson, supra; Gombert* v. *McKay*, 201 N. Y. 27), the master's duty existed before the statute. While the statute itself may create a cause of action where its breach is the proximate cause of the injury (*Marino* v. *Lehmaier*, 173 N. Y. 530), the plaintiff in the case at bar is not asserting any such statutory cause of action. His claim is based upon the common-law liability of the defendant. In the *Marino* case the late Judge O'Brien, a jurist of recognized eminence and ability, said in his dissenting opinion (p. 544): "The case of *Stewart* v. *Ferguson* (164 N. Y. 553) was one in which a person was injured by the fall of a scaffold on which he was at work. Section 18 of the Labor Law prohibited persons employing laborers to work upon a scaffold from furnishing unsafe, unsuitable or improper scaffolding. It was held in that case that the plaintiff could recover, but he could recover just as well before the statute upon proof that the scaffold was unsafe or made of unsuitable materials. That was not a case where the statute created

a cause of action." In the case at bar neither the plaintiff nor his fellow-painters using the scaffold had any part in its construction. The only thing they did was to paint. The scaffold was erected by "an extra gang" picked for the exclusive purpose of rigging the scaffolds.

That the general maritime law may be modified by State statutes in cases where such modifications will not work "material prejudice to the characteristic features of the general maritime law [nor interfere] with the proper harmony and uniformity of that law in its international and interstate relations" has been expressly declared by the Supreme Court of the United States. This is conceded in the prevailing opinion of Mr. Justice McReynolds in *Southern Pacific Co.* v. *Jensen* (*supra*, 216), and reiterated by the same learned judge in *Western Fuel Co.* v. *Garcia* (decided December 5, 1921, —— U. S. ——; N. Y. L. J. Dec. 27, 1921).

I cannot see how this humane statutory requirement expressive of the public policy of the State of New York, designed for the protection of the life and limb of laborers upon scaffolds, introduces any new principle of substantive law. True, it is enforceable only in the State of New York, but in its application to an action by an employee residing in the city of New York working for the time being in painting a vessel moored to a dock in the city of New York, against his employer, a domestic contracting corporation, I cannot see how it offends any of the essentials referred to by Mr. Justice McReynolds in *Western Fuel Co.* v. *Garcia* (*supra*). It does not interfere with the harmony or uniformity of the maritime law because the litigants are both residents of the State of New York. The defendant is not a shipowner whose vessel may be in one jurisdiction to-day and in another to-morrow. The plaintiff is not a sailor or one of a crew who may assert alleged causes of action in divers jurisdictions. Employers of labor in all jurisdictions are required by the common law to furnish their employees with safe tools and appliances and scaffolds. In the State of New York the statute, section 18, declares the rule, and as to work performed in that State prohibits employers from furnishing unsafe scaffolds. It takes from the employer no defense which he might plead in any court in

any jurisdiction save that it makes the duty absolute and prevents him from pleading that the scaffold was built by a fellow-servant of the injured employee, and that he, the master, is thus discharged from liability. If such defense may be invoked under the maritime law in a suit against a vessel or a vessel owner, the enforcement of such a salutary regulation is not, it seems to me, to be condemned in an action like the present controversy between two residents of the State relating to the performance of work within the State. In my opinion, the Court of Appeals has not decided to the contrary in any of the cases cited. The Supreme Court of the United States has said in the *Jensen Case* (*supra,* 216) that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by State legislation," but cites the opinion of Mr. Justice BRADLEY in *The Lottawanna* (21 Wall. 558, 575): "It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States." Judged by this standard I can see nothing in the enforcement of this safety requirement between the litigants in the case at bar which "contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." (*Southern Pacific Co.* v. *Jensen, supra,* 216.)

"Actions to recover damages for the breach of a statutory duty are not to be confounded with those based solely on negligence. In the latter class of cases the violation of a statute or an ordinance, if it has some connection with the injuries complained of, is evidence, more or less cogent, of negligence which the jury may consider with all the facts proved." (*Amberg* v. *Kinley,* 214 N. Y. 531, 536, citing *Union Pacific R. Co.* v. *McDonald,* 152 U. S. 262, 283; *Hayes* v. *Michigan Central R. R.*

Co., 111 id. 228, 239; *Kelley* v. *N. Y. State Railways*, 207 N. Y. 342; *Fluker* v. *Ziegele Brewing Co.*, 201 id. 40.)

We think that in the case at bar the plaintiff was entitled to have the jury informed of the existence of the statutory prohibition against unsafe scaffolds, and instructed that if they found that the statute had been violated and that the violation had caused the accident, they might consider the statute with all the other facts proved in determining whether defendant was guilty of negligence. We also think the defendant was entitled to have the jury instructed that section 18 is a positive prohibition laid upon the master without exception upon account of his ignorance or the carelessness of his servants.

We think the exceptions present reversible error and that the judgment should be reversed and a new trial granted.

BLACKMAR, *P. J.*, and JAYCOX, *J.*, concur; RICH and MANNING, *JJ.*, dissent and vote to affirm.

Judgment and order reversed and new trial granted, with costs to abide the event.

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Argument 1

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Supreme Court of the United States

OCT. TERM, 1924.

No. 316.

ROBINS DRY DOCK AND REPAIR COMPANY, *Plaintiff-in-error,* vs. LARS DAHL, *Defendant-in-error.*	On writ of error to the Supreme Court of the State of New York for the County of Kings.

BRIEF OF ARGUMENT ON BEHALF OF DEFENDANT-IN-ERROR

Statement of the case

The statement of the case made in behalf of the plaintiff-in-error, does not present clearly certain features which are important from the standpoint of the defendant-in-error.

Robins Dry Dock and Repair Company is a domestic corporation organized under the Laws of the State of New York (p. 5, transcript). Lars Dahl was in its employ as a mechanic's helper (pp. 15-16, transcript). On February 2nd, 1920, repair work was being done by the said employer upon a ship "El Occident". This ship as

matter of fact (although the record does not appear to show it) was laying in navigable water, and was moored to the employer's dock in the City of New York, Borough of Brooklyn, within the territorial limits of the State of New York and of said City and Borough.

A part of the repairs being made were repairs to the engine, and the accident happened in the course of lowering a heavy valve into the engine room. The valve was hung on tackle a few feet above the floor (composed of iron grating), of a gallery surrounding the engine room, and about thirty feet above the floor of the engine room. A portion of this grating floor of the gallery, about 10 by 3 feet, directly below the suspended valve, had been taken up, and was covered with boards (p. 16, transcript).

The work of lowering the valve was being done by a gang of three or four workmen, among whom was the defendant-in-error, a mechanic's helper, under the supervision of one Kilbride, a rigger foreman (pp. 16-34, transcript).

It was necessary to have a plank to lay across this opening, which was strong enough for the men to work upon, and Kilbride, the foreman, sent all of the men, including the defendant-in-error, to search upon the ship for a suitable plank, saying, "Look around and you will find some kind of a plank." The men went on this errand, and some returned with pieces that were unsuitable and short which they brought to the rigger boss Kilbride, and he rejected them (pp. 17-34, transcript). Defendant-in-error and his fellow servant Kenny, searching together on the aft part of the ship under the specific order of Kilbride, found a plank about 14 feet long, 8 to 10 inches wide, and about 2 inches thick (pp. 17, 35 transcript). It appeared to be a new plank and

they saw nothing defective about it although it does not appear that they subjected it to anything more than a casual look (transcript, p. 29). Kenny said, "We will take it to the rigger, (Kilbride) and see if it is all right" (p. 38, transcript). They brought it to Kilbride and asked him if it was all right, and he looked at it, and said, "Yes" and then directed them to lay it across the opening (transcript, pp. 18, 29, 34).

They did so, and Kilbride stepped upon the plank, and was engaged in putting a sling upon the valve hanging above, and the defendant-in-error stepped upon the plank to assist him, when the plank broke in two, and he fell through the opening to the engine room below, and sustained severe injuries. Kilbride saved himself by seizing the loose end of the rope (transcript, p. 18).

After the plank broke the pieces were seen by Kenny who testified that it had a knot right near the edge and on one side, which ran crossways in he plank. This was mostly concealed by the wood, but you could see about an inch of this knot that was cut off by the saw. The knot was noticeable at the edge of the plank for an inch or an inch and a half (transcript, pages 35, 39, 40).

The plank was not selected from others furnished by the employer, but was a single plank laying on the deck. There was no testimony by the plaintiff-in-error that a supply of proper materials had been furnished. On the contrary testimony was offered by the defendant-in-error, that there were no other planks on the job, which testimony was objected to by counsel for the plaintiff-in-error, and was excluded on such objection (transcript, pp. 32, 36).

The evidence further shows that there was a custom at this time, and in this locality, and under the circumstances under which this plank was used, for the boss

rigger to test a new plank before using it for the first time, by placing one end on some object and jumping on the plank and then turning it over and repeating the operation (transcript, pp. 56, 57, 58, 61).

Some of the petitioner's witnesses, including Kilbride, admitted that this test was used, but confined it to times when the plank would show a defect (transcript, 70, 72, 73). Others said that if a knot was visible they would throw the plank out without a test (transcript, p. 74). Kilbride testified for the plaintiff-in-error that there were three knots across the plank, but that they did not show, "not as he could see (transcript, p. 69).

The plank was not produced in Court.

The points in the evidence which we wish to make clear are, that there was no quantity of suitable material, or planks furnished by the master, out of which selection could be made, but that this one plank was the only one, suitable even as to length which was to be found upon the ship, after search both forward and aft. That it was not "selected" by the servant or by his fellow servants, but was taken to the boss rigger, and used as an appliance upon his orders. That it contained a defect discoverable by reasonable inspection. That no proper inspection was made by either the boss rigger or anyone representing the master, nor was the test, shown to be customary under the circumstances, applied.

We think under this evidence that the statement that the defendant-in-error and his fellow servant Kenny "finally selected the plank" is very misleading (p. 16, brief). Likewise is the statement that "The plank finally selected was one chosen by the injured man himself and his companion" (p. 6 of brief). This is repeated (p. 7 of brief) when it is said that "examination of the oral testimony" * * * shows conclusively that the plank "*se-*

lected by the defendant-in-error himself, was apparently suitable for the purpose for which it was used, etc."

We call attention to these statements in the evidence because they might lead the court to infer that the proof showed that the master had performed its duty of furnishing proper material and that there was negligence of the servant and his fellows in selecting an unsound plank rather than a sound one.

Upon this evidence the case was sent to the jury under a charge which we claim amounted in substance to a submission upon principles common to the maritime law and to the common law, and which were not modified in substance by mention and consideration of the State Statute known as the Labor Law, relating to scaffolds.

Over one half the charge is devoted to a careful exposition of the law of negligence to be applied to the situation.

The Court then speaks of the application of "maritime law" to this case, saying, "But the maritime law is applied and those maritime laws are known by lawyers as the common law" (p. 78, transcript) and the same rules apply that the burden is on the plaintiff to prove that the defendant was negligent and he himself free from contributory negligence."

The Court then read the Labor Law (transcript, p. 78, fol. 134) and said that decisions held that it did not constitute the master an insurer of the safety of the scaffold, and continued

> "* * * "it requires the scaffold to be so safe as to give proper protection to the workmen engaged in their duty. However careful the master, he is responsible unless the scaffold is in fact a proper one, proper to protect the workman in the performance of his work. No law of the State can

modify or affect the rights of workmen who are operating under the maritime law. And it has been held that (fol. 135) this Section 18 of the Labor Law does not modify or affect the law, but may be read in conjunction with the law. And as I understand the law to be, in determining in this case whether the defendant was negligent—for the plaintiff must still prove that the defendant was negligent—you must have in mind that there was in existence in the State a law which imposed upon the defendant the burden and the necessity of providing a scaffold that was proper for the workman to work upon. And in this case, in the light of that law, you must determine whether the defendant, knowing the law, as it was called upon to know it, acted negligently, and whether or not the plaintiff has proved, by a fair preponderance of evidence, that it acted negligently. If you find that in view of Section 18 of the Labor Law the defendant did act negligently, then you go to the next proposition. If you find that it did not act negligently, that ends this case, and you must render a verdict in favor of the defendant. Assuming, for the purpose of bringing to your attention all of the law in the case, that you find under these circumstances the defendant was negligent, then you come to the next proposition, was the plaintiff free from negligence that contributed to the injury. If he was free, then he is entitled to a verdict. If he did something that contributed to the injury, then he is not entitled to a verdict."

The Court then reviewed the evidence, saying that neither the plaintiff nor his fellow servant Kenny or the boss rigger Kilbride saw from what observation they made, any defect in the plaink. The evidence of the custom to test an unused plank or new plank under such circumstances, is also mentioned and the question whether there was negligence in that regard is left to the jury (transcript, p. 80, fol. 137).

Counsel for the plaintiff-in-error then excepted to that part of the charge applying Sec. 18 of the Labor Law to the case, and to the reading of the law (transcript, p. 82, fol. 141).

POINT ONE

The charge of the Trial Court was in substance and effect a submission of the case under principles of the maritime law governing the situation, and the consideration given to the Labor Law of the State of New York. Sec. 18 did not have the effect of enlarging the duties of this plaintiff-in-error or curtailing its defences.

It seems that the very first point to consider in this case is whether the Labor Law, as charged in this case, and as applied to the circumstances, made any real change in the principles of law to be applied. If it did not, then it is entirely immaterial whether it could, under some circumstances, and construed in some manner, so modify the principles of the maritime law, as to be repugnant to constitutional provisions. We contend, having regard to substance rather than form, the jury were no differently charged in this case than justified by principles of maritime law irrespective of such statute.

The plaintiff-in-error contends that he is prejudiced because, the duty of the master to the servant in respect of the furnishing of a proper plank is by the statute made an absolute one, whereas under maritime or common law it is limited to the exercise of reasonable care (pp. 27 and 28, brief of plaintiff-in-error).

We have no inclination to deny that in some situations the statute may be so construed and applied as to make the duty of the master dependent upon the question

whether the appliance was in fact a proper one, rather than upon the question whether the master had used due care. There are in New York State conflicting decisions as to the effect of a violation of a statute, or local ordinance, in an action of tort (See *Martin* v. *Herzog,* 228 N. Y. 164). But the decision in the case at bar is expressly confined to the proof of the statute as some evidence that the acts complained of constituted negligence. And the decisions in this state in respect of the materiality of this statute in an action for a maritime tort have gone no further than to hold that the violation of the statute may be considered by the jury as evidence of negligence.

Indeed upon the first appeal of this case at bar the plaintiff's judgment was reversed and a new trial ordered upon the ground that the Trial Court had submitted the case to the jury upon the theory that the violation of the statute was itself the tort and of itself was sufficient to support a verdict, rather than that it was only evidence to be considered in determining the question of defendant's conduct measured by the rule of negligence.

The Court there said (*Dahl* v. *Robins Dry Dock and Repair Co.,* 203 App. Div. 792, 795):

> "I think the learned trial justice overlooked the fact that, as a maritime case, plaintiff's right to recover could not rest solely on the Statute, irrespective of defendant's negligence. It must be determined under common law rules. It was the duty of the plaintiff to prove as alleged in the complaint, that defendant was negligent. In determining that question we have decided that the jury might consider the safety requirements of the state statute, but we never decided that the state statute alone justified recovery in a maritime case, because any such construction would offend the rule that the maritime law cannot be modified by

> state statutes so as to work material prejudice to its characteristic features. The right saved to the plaintiff in the State court was his common-law action for negligence."

The same situation existed in the case of *Wilkes* v. *United Marine Contracting Corporation* (199 App. Div. N. Y. 788) in which case the learned Presiding Justice (Kelly, P. J.) also wrote the opinion. That case involved the collapse of a completed scaffold erected for plaintiff's use and in which a defective timber had been used.

It is there said (p. 193):

> "It seems to me the benefit secured to the employee by Sec. 18 is part and parcel of the common law remedy. The duty of the master to furnish his servant with a safe place to work and with safe tools and appliances is as old as the common law itself. It is recognized in all Courts, Federal and State and in the Admiralty Law. This duty is so firmly fixed upon the master by the common law that he cannot delegate its performance to a servant and escape liability, if the servant, whatever be his grade, neglects to properly perform the duty, and injury results therefrom to a person to whom the master owed such a duty (*Crispin* v. *Babbitt*, 81 N. Y. 516; *Pantzar* v. *Tilly Foster Iron Mining Co.*, 99 *id.* 360; *Simone* v. *Kirk*, 173 *id.* 7). Certainly there is nothing revolutionary in the requirement of Sec. 18. While it may broaden the liability of the master (*Stewart* v. *Ferguson, supra; Gombert* v. *McKay*, 201 N. Y. 27), the masters duty existed before the statute. While the statute itself may create a cause of action where its breach is the proximate cause of the injury (*Marino* v. *Lehmaier*, 173 N. Y. 530) the plaintiff in the case at bar is not asserting any such statutory cause of action. His claim is based upon the common law liability of the defendant."

And in *Maleeny* v. *Standard Shipbuilding Corporation* (237 N. Y. 250) the charge of the Trial Court was:

> "If you find that the statute has been violated, and that the violation caused the accident, you may consider the statute, with all the other facts proved in determining whether the defendant was guilty of negligence" (see page 253).

The defendant-in-error contends under this point, that *in this case* the liability of the employer has not been broadened by the limited application of the statute, and shows that the violation of the statute was only evidence of negligence under the charge to the jury.

The statute prohibits the master from furnishing, in this case, a plank (called a scaffold) which was "unsafe, unsuitable or improper". If that is translated to positive form it is that he is required to furnish a plank which is "safe, suitable and proper."

Is the duty of the master something less under the maritime law? It may be said that he is only required to use reasonable care to that end.

But under the charge in the case at bar the master has not been required to perform, at all events, his statutory duty, but only to exercise due care in that respect, that is not to fail through his negligence and carelessness.

The Trial Court did say, in speaking of the scope of this law, "However careful the master, he is responsible unless the scaffold is in fact a proper one, proper to protect the workmen in performance of his work" (transcript, pp. 78, 79, fol. 134). But this was said of the requirements of the law itself. The measure of the master's responsibility in this case was charged to be something less, *i. e.* common law negligence of which the violation of this law was only evidence (see transcript, p. 79).

Moreover the charge required the jury to determine the negligence of the defendant in the matter of furnishing a proper plank, by the usual common law tests, whether reasonable inspection would have discovered the defect, and whether, under the circumstances, a test was customary and should have been used (transcript, pp. 79, 80).

The Court said (transcript, p. 80):

> "But the question for you to determine is, in the light of the conceded facts, in the light of the situation with respect to the disputed facts, as you understand them, and the circumstances and everything, *whether the defendant was negligent in permitting that plank to be used without a test.*" (Italics ours.)

In the light of these purely common law considerations actually submitted by the Trial Court we are surprised that counsel for the plaintiff-in-error contends that but for the application of this section of the Labor Law the Trial Court would have been compelled to dismiss the action.

We contend, therefore, that the duty of the master as defined in the statute and as charged by the Court, and as applied to the circumstances of this case is no different than prescribed by the maritime law. That the statute so far as it was applied to the case at bar was declaratory of the same duty existing at common law and maritime law.

The plaintiff-in-error contends, however, that but for the application of the statute this use of the plank would be considered at common law a detail of the work and ascribed to negligence of fellow servants rather than a breach of the master's duty.

If the duty to furnish for the use of the servant, this

plank, either considered as an appliance, or as materials, was cast upon this master, then of course it cannot be delegated to the servant, and the acts of the servants in using the plank cannot be considered details of the work or fellow servants' negligence.

There might conceivably be a case where the master had fulfilled his common law duty in furnishing for the use of his servants a quantity of suitable planks, upon the work, but a defective plank has been "selected" by fellow servants instead of the ones not defective, and used, and the contention could be made that the matter of "selection" was a detail of the work, and that the negligence of fellow servants was the proximate cause of the injury. If the circumstances were such that the contention was sound, and if this statute was so applied to the case that it enlarged the duty of the master, so that he nevertheless became responsible for the safety of the defective plank so selected and used, then there would be ground for the claim made here that by the application of the statute a common law defence was denied to the master.

If the situation is such that the master has, by the furnishing of sufficient and proper materials, or appliances or planks, performed his full common law duty in the matter, then, of course, at common law that would be the end of the matter.

If there had been involved in this action, the *construction* of a scaffold, including the selection of materials from proper material furnished, and involving the proper use and fastening and construction by fellow servants, and the scaffold became unsafe solely because of negligence of fellow-servants in respect of such work, and it appeared that the master had fully performed his common law duty of due care, then a condition might be

shown where a recovery would not be justified at common law, unmodified by this statute, and in that case the application of the statute might nevertheless make the master liable for the safety of the completed scaffold, and prevent the application of the so-called fellow-servant doctrine. That result might be brought about by the statutory requirement that the scaffold itself be a proper one, and the further requirement that it be "so placed and operated" as to give proper protection.

But there is nothing resembling such a situation in this case. This case involves only the furnishing of one plank by the master, and that a defective one, the defect therein being discoverable by inspection. The inspection by the boss rigger is the master's inspection, else there is no proof of any inspection by the master. The jury might find the inspection by the boss rigger for the master, inadequate. There was proof that a test was customary, and no test was used. The plank was a new one, not shown to have been selected for this use by the master with any initial care. It was not such a plank that because of prior use and inspection, reliance could reasonably be placed.

Upon such a state of facts the case was submitted to a jury, who were charged, in effect, that it was the duty of the master to furnish a plank proper to protect the servant, but that they must not only find that the duty was violated, but must find the existence of negligence, and must also find upon the question of inspection of the plank and necessity of and failure to use a test all in favor of the plaintiff below before a verdict could be found.

It is evidently some such situation as assumed *(supra)* that counsel for the plaintiff in error has in mind when he speaks of the picking up of this single plank on the ship, by the servant or his fellow as "selecting" the plank.

Such a situation only arises after the master has performed *his full duty*, because if the master's neglect in furnishing concurs with negligence of fellow servants in selection, then the accident may be ascribed to the fault of the master. (*Heiser* v. *Cincinnati Abattoir Co.*, 205 N. Y. 379; 98 N. E. 747.)

In *Maleeny* v. *Standard Shipbuilding Corporation* (237 N. Y. 250, 253-254) it is said, speaking of the circumstances in which the Labor Law under consideration works a modification of common law principles:

> "The principal modification of the common law is that the master is made liable even if the scaffold be *defectively constructed through* the negligence of fellow servants, he, *the master, having furnished proper material* (*Stewart* v. *Ferguson*, 164 N. Y. 553; *Caddy v. Interborough R. T. Co.*, 195 N. Y. 415). (Italics ours.)

Butler v. *Townsend* (126 N. Y. 105) is one of the leading cases in the state relative to the common law duty of the master in the furnishing of a scaffold for his servants, and the head note reads: "A staging or scaffolding erected for workmen is not a place in which their work is to be done, within the meaning of the rule requiring a master to furnish to his servant a suitably safe place in which to do his work; it is an appliance or instrumentality by means of which the work is to be done."

A plank used in this staging broke, and in regard to this fact it is said:

> "It is true that the plank for the staging, under the customary rule, were to be and were furnished by the defendants, *but the evidence shows that an abundant supply of sound and suitable materials was so furnished, and that the particular plank which broke, had been examined and*

condemned and marked as unsafe, and that the sole negligence which occasioned the injury, was a careless selection of that plank by the lumpers.'' (Pages 109, 110. Italics ours.)

Then it is perfectly plain that before any alleged negligence of fellow servants in selecting or using defective material for a scaffold will be considered as the proximate cause of the accident, the master must be shown to have performed his entire duty in respect of the furnishing of the material. Moreover the use or selection of the material by fellow workmen must be a negligent use, not simply the fact of using the material furnished by the master.

POINT TWO

The statute in question (formerly sec. 18, Labor Law, now Sec. 240, Labor Law of the State of New York) was provable in this action.

In the City of Norwalk (55 Fed. 98, 105), the Court, after stating the implied grant to Congress of authority over the subject of maritime law, says:

> This view however does not exclude state legislation upon matters of merely local concern, which can be much better cared for under state authority, and which have always been thus cared for; nor does it exclude general legislation by the states, applicable alike to land and water, in their exercise of the police power for the preservation of life and health, though incidentally affecting maritime affairs; provided that such legislation does not contravene any act of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its interna-

> tional and interstate relations. The long established doctrine in this field of 'border legislation' state laws are valid until Congress interposes and thereby further excludes state legislation."

The case itself involved the adoption by an admiralty court of the statute of a state creating a cause of action for death caused by negligence or tort, and the case cites many instances of "new legal rights" created by the states and directly affecting maritime matters alone, such as the creation of maritime liens, regulations as to rivers, harbors and fisheries, quarantine, floating elevators and ferries.

In the more recent case of *Southern Pacific Co.* v. *Jensen* (244 U. S. 205), a portion of the above excerpt was cited with approval, but the case held that the principles applied in Workmen's Compensation Law of the State of New York were of a character different from the principles of the maritime law, and unenforcible in Courts of Admiralty, and that the law was unconstitutional.

This case was followed by *Knickerbocker Ice Co.* v. *Stewart* (253 U. S. 149), and recently by *State of Washington* v. *Dawson* (Adv. Opin. March 15th, 1924, page 339, Case No. 366). As these three last mentioned cases involved the consideration of Workmen's Compensation Acts, statutes of an entirely different character than the one presented in the case at bar, we cannot see that they indicate in the least what the opinion of the Court would be as to the statute involved here.

In *Grant and Smith Porter Co.* v. *Rohde* (257 U. S. 469), the servant was employed by his master in the building of ships, and was injured upon an unfinished ship lying on navigable water. The Court held that the workmen's compensation act of Oregon, to which both parties had assented, was applicable, and that a proceeding in admiralty to recover for personal injuries could not be sustained.

In *Western Fuel Company* v. *Garcia* (257 U. S. 233), it was held that a state statute giving a cause of action for death caused by a tort would be inforced in an admiralty court, when the death was caused by a maritime tort. Thus the maritime law was enlarged by a cause of action resting entirely upon a state statute, which statute created a liability upon an employer for causing death, which was not cast upon him by the maritime law. He was made to respond in damages for an act, and to a class of persons, beneficiaries, for which, and to whom the maritime law held him blameless. It was said to be a matter of local concern, and not to interfere with the proper harmony and uniformity of the law in its international and interstate aspects.

In the case at bar the modification of the maritime law by the statute in question, even the greatest modification that could be brought about under any circumstances by the application of the law, seems very much less than that permitted in the *Garcia* case.

In this case the statute in question seems to fall clearly within the permissible state legislation, as defined in the *City of Norwalk (supra)* and *Southern Pacific* v. *Jensen (supra)*. It is a matter of "purely local concern, which can be much better cared for under state authority, and which has always been thus cared for," it is "general legislation * * * applicable alike on land and water, passed in the exercise of the police power for the preservation of life and health, though incidentally affecting maritime matters." It certainly does not "contravene any act of Congress" and we think it is equally clear that it does not "work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations." The very most that can be said in favor of the contention of the plaintiff in error,

is that under some circumstances it extends the responsibility of the master to a completed scaffold as a place of work, rather than to permit him to delegate the erection to servants, and makes the due performance of the duty the measure of the tort.

We have pointed out in our first point that this was not the result of the application of the statute to the circumstances of the case at bar. But even on the assumed result of the statute, can it be said that a reasonable enlargement of a master's duty as to place of work is such a change as works prejudice to characteristic features of the maritime law?

The statute does nothing more than to classify a completed scaffold as a place of work for the safety of which the master would be responsible at common law, whereas certain common law decisions in this state assumed to regard the scaffold as divided into component parts of materials and appliances, and to hold that the master could perform his entire duty in the furnishing of such materials and appliances (*Butler* v. *Townsend, supra*).

This view permitted the master to interpose the defence that a completed scaffold was unsafe, not because he had failed to furnish proper materials, but because of negligence in construction for which he was not responsible.

This principle then is not the fundamental principle of a master's liability for his own negligence, or his nonliability for the negligence of fellow servants. It is a *rule* for the application of these principles to particular situations. We are not prepared to admit that it is a universal rule of application adopted by the common law, and undoubtedly common law courts differ as to its applicability to situations, and undoubtedly admiralty courts would also differ.

In *Imbroveck* v. *Atlantic Transport Co.* (190 Fed. 229, 239, affd. 234 U. S. 52) the accident resulted from the failure of the stevedore, the master, to secure by wooden pins, furnished and at hand, certain of the hatch covers on the ship, thus rendering the place unsafe for the work. The contention was made by the stevedore that having furnished the necessary pins the failure to use them should be attributed to the negligence of fellow servants. The Court said that such a defence could not be interposed as against the ship, and as against the stevedore held that the accident would be attributed to the failure of the employer to furnish a safe place of work.

Counsel for the plaintiff-in-error shows by common law decisions in New York State, what he claims the rule to be before it was modified by statute (pages 27 and 28 of brief). He then assumes without citation or argument that this particular rule was part of the maritime law, and he claims that it is a "characteristic principle". The question then naturally arises as to how this particular rule, by which the master escaped liability for the safety of a completed scaffold, became a part of the maritime law. Whether it was a matter of independent growth along identical lines, or whether the maritime law adopted it from the common law of master and servant. If the latter is the fact then the plaintiff-in-error is resting his case upon the propriety and constitutionality of the adoption of that rule into maritime law, and at the same time the impropriety and unconstitutionality of the subsequent adoption of a modification of that rule.

The Courts of New York State hold that the statute, as applied in this case, has become a part of the common law of the state. That would not be true probably if the statute was made the basis of a so-called statutory action; it would not be true of an act like the Employer's Liability Act, which gave a new cause of action, nor of the

Workmen's Compensation Act. But it would seem that a law of the character of the statute involved here working a gradual modification of the common law, and alleviating what was considered a harsh rule of judicial decision, would, almost automatically, modify the maritime law to be applied by the State Court. We do not see any reason why this process of adoption should stop at the moment it became most favorable to the employer. It would seem as important that the maritime law be a matter of steady growth as that the common law should.

If by gradual change in judicial decisions this same change had been worked in the common law its adoption by the maritime law would follow without comment.

We cannot see that this change interferes with the proper harmony and uniformity of the maritime law in its international and interstate relations. The relations in this action are simply those of a purely domestic employment, and not affecting shipping in any direct way. There is nothing in the record to show that the ship being repaired even was not in her home port.

This action was for tort, for a wrong, but whether a given act is wrong usually depends upon the local viewpoint. It depends upon local custom and conditions and local law to a large extent. It may be assumed that there are good reasons for such local laws. This is especially true in determining whether an act is a tort measured by the rule of negligence.

The case of *Frese* v. *Chicago Burlington and Quincy Railroad Company* (decided by this Court, Oct. 15th, 1923, Adv. Opin. Nov. 1st, 1923), was an action under the Federal Employer's Liability Act, for damages for causing the death of an engineer of the defendant, and it appeared that the deceased had violated a state statute of Missouri, which statute required him to bring his train

to a stop before crossing the tracks of another railroad, and to surely ascertain that no danger existed. The violation of the state statute prevented a recovery on the part of the next of kin, and it was held that the statute was applicable to determine the question of the contributory negligence of the deceased.

Counsel for the plaintiff-in-error relies on *Schwede* v. *Zenith Steamship Co.* (244 U. S. 646) mentioned on page 30 of his brief. This case is distinguished in the *Maleeny* case (*Maleeny* v. *Standard Shipbuilding Corporation,* 237 N. Y. 250) by the statement that Schwede was a seaman (p. 260). It also appears that the state employer's liability act created a statutory cause of action, and the Court held that it would not be inforced in an admiralty court.

POINT THREE

If the argument under our Point One is sound, and the maritime law has not been modified in this case, or modified in any substantial degree, then there is not presented a federal question, sufficient to justify the granting of a writ of error, and the writ should be dismissed, with costs.

POINT FOUR

If the writ of error is not dismissed, the judgment should be affirmed on the merits, with costs.

Respectfully submitted,

RALPH G. BARCLAY,
Counsel for the Defendant-in-error.

ROBINS DRY DOCK & REPAIR COMPANY *v.* DAHL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 316. Argued December 4, 1924.—Decided January 5, 1925.

1. An injury suffered by a workman while repairing a completed vessel afloat in navigable waters, and due to the negligence of his employer, is a maritime tort. P. 457.
2. In such cases the rights and liabilities of the parties arise out of and depend upon the maritime law and cannot be enlarged or impaired by state statute. *Id.*
3. In an action based upon such an alleged maritime tort in a state court, an instruction that the jury in deciding whether the employer was negligent might consider the provisions of a local law regulating the duty of employers to furnish safe scaffolds, etc., for their employees, was manifestly erroneous and material. *Id.*

197 N. Y. S. 463; 202 N. Y. 922, reversed.

ERROR to a judgment of the Supreme Court of New York entered on mandate of affirmance from the Appellate Division, in favor of Dahl in his action for damages resulting from personal injuries received by him in the course of his employment by the Dry Dock Company

and due, as he alleged, to the Company's negligent failure to furnish him with a safe place in which to work. Review by the New York Court of Appeals was refused. For the decision of the Appellate Division on an earlier trial, see *Dahl* v. *Robins Dry Dock Co.*, 203 App. Div. 795.

Mr. A. George Maul for plaintiff in error.

The jurisdiction of the Supreme Court of New York in actions of this character is confirmed by cl. 3 of §§ 24 and 256, Jud. Code, and is limited to the enforcement by a common law remedy of a right given under the admiralty law.

From the time of the earliest decisions of this Court under these sections, attempts have been made to distinguish individual cases so as to apply state laws which were repugnant to the admiralty law as it was generally enforced throughout the United States. But in every instance where the state statute affected or modified a right given under the maritime law, the statute has been held unconstitutional. *Southern Pac. Co.* v. *Jensen*, 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Industrial Comm.* v. *Nordenholt Co.*, 259 U. S. 263; *Washington* v. *Dawson & Co.*, 264 U. S. 219; *Schwede* v. *Zenith S. S. Co.*, 244 U. S. 646; s. c. 216 Fed. 566; *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372; *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638; *Workman* v. *New York City*, 179 U. S. 552; *Steamboat Co.* v. *Chase*, 16 Wall. 522.

The only apparent exceptions are those cases where the admiralty law did not afford either a right or a remedy as, for example, a right of action to recover damages for death on the high seas; or the right of a lien where the admiralty law gave none. *Western Fuel Co.* v. *Garcia*, 257 U. S. 233; *The Lottawanna*, 21 Wall. 558; *The J. E. Rumbell*, 148 U. S. 1.

It has frequently been suggested that particular classes of persons ought not to be included within the rule or ought to receive different treatment. An instance of this is the recent amendment to cl. 3 of §§ 24 and 256 by Act of June 10, 1922, declared by this Court to be unconstitutional. At the time of the passage of that amendment it was stated to Congress by its proponents that the objectionable feature had been removed by confining its application to local workers; but the fallacy of such contention was clearly pointed out in *Washington* v. *Dawson & Co., supra,* when this Court stated that any inequities which may arise from the situation are within the power of Congress to alter by enacting "statutes of general application embodying its will and judgment," as was done in the matter of prescribing the liability of interstate carriers, thereby abrogating local rules. *New York Cent. R. R. Co.* v. *Winfield,* 244 U. S. 147.

The "saving clause" requires rights to be measured by admiralty law. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 337; 1 Corp. Jur. 1252; *The Moses Taylor,* 4 Wall. 411; *Chelentis* v. *Luckenbach S. S. Co., supra; Southern Pac. Co.* v. *Jansen, supra; Knickerbocker Ice Co.* v. *Stewart, supra.*

This limitation on the power of the States to interfere with the uniform federal maritime law applies equally to judicial decisions. *Knickerbocker Ice Co.* v. *Stewart, supra; The Hine* v. *Trevor,* 4 Wall. 555.

Section 18 of the Labor Law of New York, when applied to an admiralty action, materially alters the characteristic features of the federal maritime law, and is, when so applied, repugnant to the Federal Constitution. *Dahl* v. *Robins Dry Dock Co.,* 203 App. Div. 792, 796; *Wilkes* v. *United Marine Co.,* 199 App. Div. 788.

The trial court would have been compelled to dismiss the complaint at the end of the plaintiff's case, and again at the end of the whole case, but for the application of § 18 of the Labor Law.

Mr. Ralph G. Barclay for defendant in error.

The charge of the trial court was in substance and effect a submission of the case under principles of the maritime law governing the situation, and the consideration given to the Labor Law of New York did not have the effect of enlarging the duties of plaintiff in error or curtailing its defenses.

There are in New York State conflicting decisions as to the effect of a violation of a statute, or local ordinance, in an action of tort (see *Martin* v. *Herzog*, 228 N. Y. 164). But the decision in the case at bar is expressly confined to the proof of the statute as some evidence that the acts complained of constituted negligence.

Indeed, upon the first appeal of this case, the plaintiff's judgment was reversed and a new trial ordered upon the ground that the trial court had submitted the case to the jury upon the theory that the violation of the statute was itself the tort and of itself was sufficient to support a verdict, rather than that it was only evidence to be considered in determining the question of defendant's conduct measured by the rule of negligence. *Dahl* v. *Robins Dry Dock Co.*, 203 App. Div. 792, 796. See also *Wilkes* v. *United Marine Co.*, 199 App. Div. 788; *Maleeny* v. *Standard Shipbuilding Co.*, 237 N. Y. 250.

The statute prohibits the master from furnishing, in this case, a plank (called a scaffold) which was "unsafe, unsuitable or improper." If that is translated to positive form it is that he is required to furnish a plank which is "safe, suitable and proper."

Is the duty of the master something less under the maritime law? It may be said that he is only required to use reasonable care to that end. But under the charge in the case at bar the master has not been required to perform, at all events, his statutory duty, but only to exercise due care in that respect,—that is, not to fail through his negligence and carelessness.

Moreover, the charge required the jury to determine the negligence of the defendant in the matter of furnishing a proper plank, by the usual common law tests. *Maleeny* v. *Standard Shipbuilding Co., supra; Butler* v. *Townsend,* 126 N. Y. 105.

The statute in question was provable in this action. *The City of Norwalk,* 55 Fed. 98; *Southern Pac. Co.* v. *Jensen,* 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Washington* v. *Dawson & Co.,* 264 U. S. 219; *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233.

The statute does nothing more than to classify a completed scaffold as a place of work for the safety of which the master would be responsible at common law, whereas certain common law decisions in the State assumed to regard the scaffold as divided into component parts of materials and appliances, and to hold that the master could perform his entire duty in the furnishing of such materials and appliances. *Butler* v. *Townsend, supra.*

This view permitted the master to interpose the defense that a completed scaffold was unsafe, not because he had failed to furnish proper materials, but because of negligence in construction for which he was not responsible.

This principle then is not the fundamental principle of a master's liability for his own negligence, or his nonliability for the negligence of fellow servants. It is a rule for the application of these principles to particular situations. *Imbrovek* v. *Atlantic Transport Co.,* 190 Fed. 229; s. c. 234 U. S. 52.

It would seem that a law of this character, working a gradual modification of the common law, and alleviating what was considered a harsh rule of judicial decision, would, almost automatically, modify the maritime law to be applied by the state court. If by gradual change in judicial decisions this same change had been

worked in the common law, its adoption by the maritime law would follow without comment. We cannot see that this change interferes with the proper harmony and uniformity of the maritime law in its international and interstate relations. The relations in this action are simply those of a purely domestic employment, and not affecting shipping in any direct way. There is nothing in the record to show that the ship being repaired even was not in her home port.

This action was for tort, for a wrong; but whether a given act is wrong usually depends upon the local viewpoint. It depends upon local custom and conditions and local law to a large extent. It may be assumed that there are good reasons for such local laws. This is especially true in determining whether an act is a tort measured by the rule of negligence. *Frese* v. *Chicago, B. & Q. R. R. Co.*, 263 U. S. 1. *Schwede* v. *Zenith S. S. Co.*, 244 U. S. 646, distinguished. See *Maleeny* v. *Standard Shipbuilding Co.*, 237 N. Y. 250.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Defendant in error Dahl brought an action against the Robins Company—plaintiff in error—a New York corporation, in the Supreme Court, Kings County, New York, to recover damages for personal injuries. He alleged: That on February 2, 1920, while employed by the Robins Company and doing repair work on the steamer "El Occident," then lying in navigable waters at Brooklyn, a plank scaffold on which he was walking or standing broke and caused him to fall into the hold. That he sustained serious injuries caused solely by and through negligence in that the company did not furnish a safe place to work and failed to provide a safe scaffold as required by the Labor Laws of the State of New York, but negligently and carelessly furnished an unsafe, inadequate and unsuitable scaffold and plank.

The trial court instructed the jury—

"This is what we call a maritime tort, an action in negligence that is governed by the maritime laws, the admiralty laws, the laws that pertain to navigable waters in this country. . . . The law permits even a maritime case, such as should ordinarily be brought in the United States court, to be tried in a State court. But the maritime law is applied, and those maritime laws are known by lawyers as the common law. . . .

"Under the common law the same rule applies in this case as the rules that I have laid down to you, that the burden is upon the plaintiff to prove that the defendant was negligent, and that he himself was free from any contributory negligence. In this case, however, comes a provision known as Section 18 of the Labor Law, and Section 18 of the Labor Law reads as follows: 'A person employing or directing another to perform labor of any kind, in the erection, repairing, altering or painting of a house, building or structure, shall not furnish, or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances, which are unsafe, unsuitable, or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged.'

"The decisions hold that Section 18 of the Labor Law does not make an employer, as we term him, the 'master,' in this case the defendant, an insurer of the scaffold—and this plank within the meaning of the law is a scaffold—it does not make the master an insurer of the safety of the scaffold under all conditions; it requires the scaffold to be so safe as to give proper protection to the workmen engaged in their duty. However careful the master, he is responsible unless the scaffold is in fact a proper one, proper to protect the workman in the performance of his work. No law of the State can modify or affect the rights

of workmen who are operating under the maritime law. And it has been held that this Section 18 of the Labor Law does not modify or affect the law, but may be read in conjunction with the law.

"And as I understand the law to be, in determining in this case whether the defendant was negligent—for the plaintiff must still prove that the defendant was negligent—you must have in mind that there was in existence in the State a law which imposed upon the defendant the burden and the necessity of providing a scaffold that was proper for the workman to work upon. And in this case, in the light of that law, you must determine whether the defendant knowing the law, as it was called upon to know it, acted negligently, and whether or not the plaintiff has proved, by a fair preponderance of evidence, that it acted negligently.

"If you find that in view of Section 18 of the Labor Law the defendant did act negligently, then you go to the next proposition. If you find that it did not act negligently, that ends this case, and you must render a verdict in favor of the defendant. Assuming, for the purpose of bringing to your attention all of the law in the case, that you find under these circumstances the defendant was negligent, then you come to the next proposition, was the plaintiff free from negligence that contributed to the injury. If he was free, then he is entitled to a verdict. If he did something that contributed to the injury, then he is not entitled to a verdict."

Proper exceptions were noted. Judgment went for plaintiff Dahl and this was approved upon appeal. The plaintiff in error maintains that the trial court committed material error by instructing the jury as above stated. On the other side the claim is that the challenged instruction only permitted the jury to consider violation of the state law as evidence of negligence and did not therefore materially affect the question of responsibility.

The alleged tort was maritime, suffered by one doing repair work on board a completed vessel. The matter was not of mere local concern, as in *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 476, but had direct relation to navigation and commerce, as in *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U. S. 479. The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute. *Chelentis* v. *Luchenbach S. S. Co.*, 247 U. S. 372, 382; *Union Fish Co.* v. *Erickson*, 248 U. S. 308; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259. They would not have been different if the accident had occurred at San Francisco.

The jury were distinctly told that they might consider the privisions of the local law in deciding whether or not the employer was negligent. No such instruction would have been permissible in an admiralty court, and it was no less objectionable when given by the state court. The error is manifest and material. See *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, 511; *New Orleans & N. E. R. R. Co.* v. *Harris*, 247 U. S. 367, 371; *American Railway Express Co.* v. *Levee*, 263 U. S. 19, 21.

The judgment must be

Reversed.